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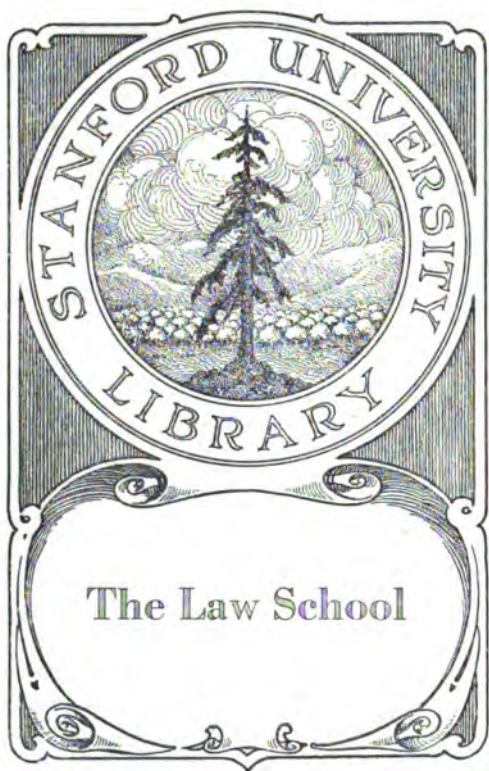
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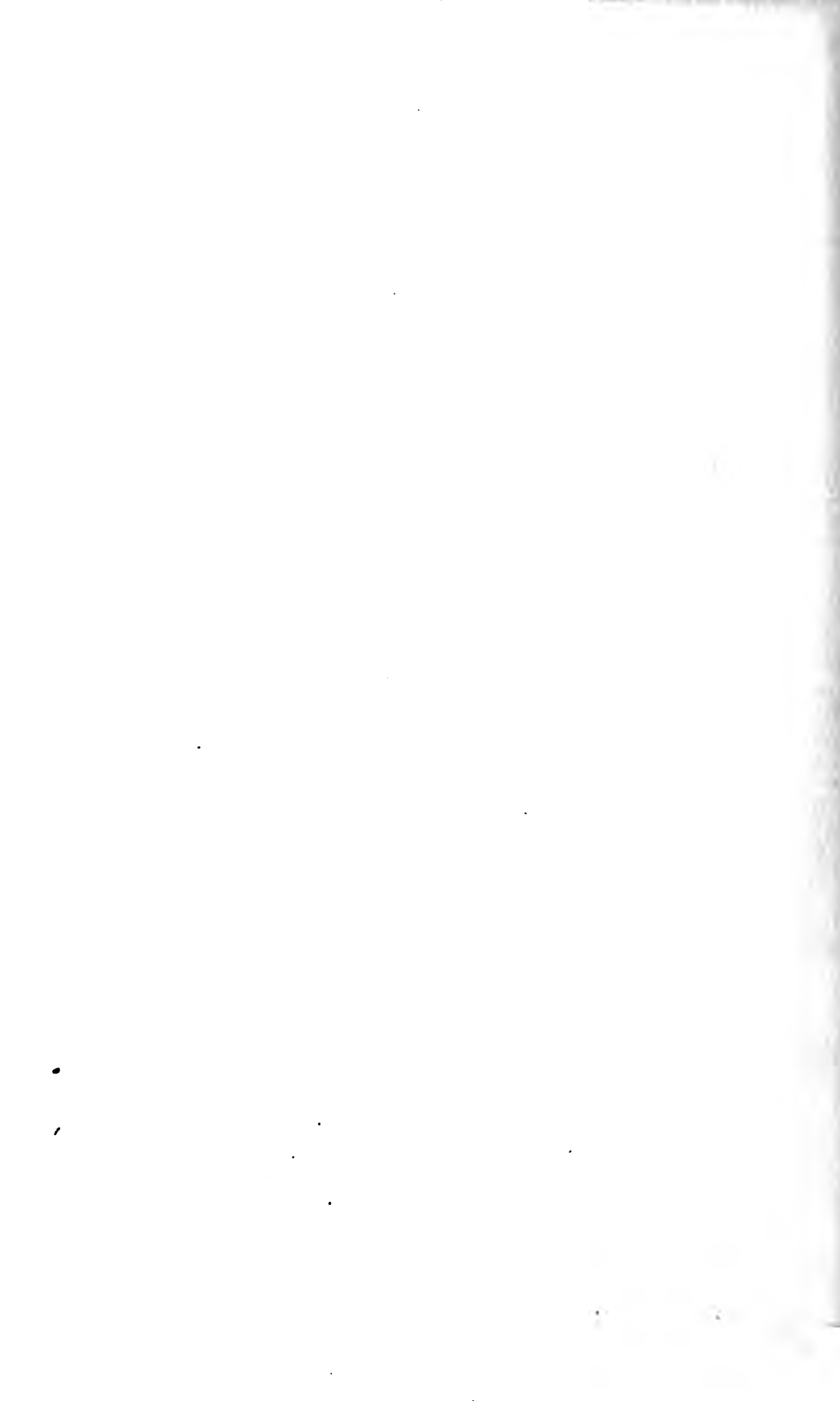
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My dear Mr. C.

11







REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME XXXIV.

CONTAINING

5 APPEAL CASES, pp. 623-925.

6 APPEAL CASES, pp. 1-881.

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JUDGES.

LORD HIGH CHANCELLOR.

Right Hon. LORD CAIRNS,¹ appointed 1874.

Right Hon. LORD SELBORNE,² " 1880.

LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.

Right Hon. LORD GORDON,³ " "

Right Hon. WILLIAM WATSON,⁴ " 1880.

PRIVY COUNCIL, JUDICIAL COMMITTEE.

(APPOINTED UNDER 34 & 35 VICT., CH. 91: USUALLY SITTING.)

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Right Hon. Sir BARNES PEACOCK.

Right Hon. Sir MONTAGUE E. SMITH.⁶

Right Hon. Sir ROBERT P. COLLIER.

Right Hon. Sir RICHARD COUCH.⁷

-
- ¹ Retired with Earl of Beaconsfield's administration, April, 1880: 15 L. J., 227.
² Appointed under Gladstone's administration, April, 1880: 15 L. J., 227.
³ Died August 21, 1879: 15 L. J., 118.
⁴ Appointed to fill vacancy of Lord Gordon, April, 1880: 15 L. J., 115, 234.
⁵ Died December 7, 1880: 15 L. J., 596, 602.
⁶ Resigned December 21, 1881: 16 L. J., 607, 622; 72 L. T., 168.
⁷ Appointed January 28, 1881, in place of Sir JAMES W. COLVILLE: 16 L. J., 49, 58.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Ex officio Members.

The Right Hon. the LORD HIGH CHANCELLOR (President).
 The Right Hon. the LORD CHIEF JUSTICE OF ENGLAND.
 The Right Hon. the MASTER OF THE ROLLS.
 The Right Hon. the LORD CHIEF JUSTICE OF THE COMMON PLEAS.
 The Right Hon. the LORD CHIEF BARON OF THE EXCHEQUER.

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Right Hon. Sir GEORGE WM. W. BRAMWELL, ³	" 1876.
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Right Hon. Sir RICHARD PAUL AMPHLETT, ⁵	" "
Right Hon. Sir HENRY COTTON, ⁶	" 1877.
Right Hon. Sir ALFRED HENRY THESIGER, ⁷	" "
Right Hon. Sir GEORGE JESSEL, ⁸	" 1881.
Right Hon. Sir NATHANIEL LINDLEY, ⁹	" "
Right Hon. Sir JOHN HOLKER, ¹⁰	" 1882.
Right Hon. Sir CHARLES SYNGE CHRISTOPHER BOWEN, ¹¹	" "
Right Hon. Sir JOHN DAVID FITZGERALD, ¹²	" "
Right Hon. Sir EDWARD FRY, ¹³	" 1883.

1 Died June 7, 1881: 16 Law Jour., 268; 71 Law Times, 106.

2 Died June 16, 1877: 12 Law Jour., 372.

3 Retired September 1, 1881: 71 L. T., 338; 16 L. J., 411.

4 Appointed Master of the Rolls, April 5, 1868: 18 L. J., 183, 208.

5 Retired on account of ill health, October, 1877: 63 L. T., 417. Died January 7, 1884: 76 L. T., 128; 18 L. J., 687.

6 Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.

7 Appointed November, 1877, in place of Lord Justice AMPHLETT: 12 L. J., 631. Died October 20, 1880: 16 L. J., 507, 508, 518, 527; 69 L. T., 419, 433.

8 Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397. Died March 21, 1888: 74 L. T., 375, 390.

9 Promoted from Court of Common Pleas, October 29, 1881: 71 L. T., 409. Sworn in November 1, 1881: 72 L. T., 12.

10 Died May 24, 1882: 17 L. J., 275; 73 L. T., 71.

11 Appointed from Queen's Bench to Court of Appeal, in place of Sir JOHN HOLKER, June 1, 1882: 73 L. T., 87; 17 L. J., 289.

12 Appointed June 5, 1882: 73 L. T., 104; 18 L. J., 318.

13 Appointed to Court of Appeal, from Chancery Division, April 5, 1883: 18 L. J., 183, 203; 74 L. T., 401; 18 L. J., 216, 239.

NAMES OF THE JUDGES

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Right Hon. the LORD HIGH CHANCELLOR (President).

Right Hon. Sir GEORGE JESSEL, ¹ Master of the Rolls, appointed 1878.	
Right Hon. Sir WILLIAM BALIOL BRETT, ²	" 1888.
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Hon. Sir JAMES BACON, " "	" 1870.
Hon. Sir CHARLES HALL, ⁴ " "	" 1878.
Hon. Sir EDWARD E. KAY, ⁵ " "	" 1881.
Hon. Sir EDWARD FRY, ⁶ Justice of the High Court,	" 1877.
Hon. Sir JOSEPH W. CHITTY, ⁷ " " "	" 1881.
Hon. Sir JOHN PEARSON, ⁸ " " "	" 1883.
Hon. Sir FORD NORTH, ⁹ " " "	" 1881.

¹ Promoted to Court of Appeal, September 10, 1881: 16 L. J., 397. Died March 21, 1888: 74 L. T., 375, 390; 18 L. J., 159, 160, 180.

² Appointed Master of the Rolls, from Court of Appeal, April 5, 1888: 10 L. J., 138, 208.

³ Retired March 19, 1881: 16 L. J., 137, 146.

⁴ Resigned October 13, 1882: 17 L. J., 641.

⁵ Appointed March 20, 1881: 16 L. J., 147.

⁶ Appointed April 30, 1877, under the act of April 24, 1877: 12 Law Jour., 261.

⁷ Appointed September 6, 1881: 71 L. T., 321, 323; 16 L. J., 397.

⁸ Appointed and sworn in, October 24, 1882: 17 L. J., 641, 666.

⁹ Appointed in place of Mr. Justice LINDLEY. Sworn in November 1, 1881: 72 L. T., 1, 12. Promoted to Chancery Division, April 10, 1888: 18 L. J., 206, 215.

QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN,¹ Bart., G.C.B.,
Lord Chief Justice of England, appointed 1859.

Right Hon. Sir JOHN DUKE COLERIDGE,² Lord Chief Justice of England,
appointed Dec. 1, 1880.

Hon. Sir JOHN MELLOR, ³	appointed 1861.
Hon. Sir ROBERT LUSH, ⁴	" 1865.
Hon. Sir WILLIAM V. FIELD,	" 1875.
Hon. Sir HENRY MANISTY,	" 1876.
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Hon. Sir FORD NORTH, ⁶	" 1881.
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Hon. Sir ARCHIBALD LEVIN SMITH, ⁹	" 1888.

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Hon. GEORGE DENMAN,	" 1872.
Hon. Sir NATHANIEL LINDLEY, ¹¹	" 1875.
Hon. Sir HENRY CHARLES LOPES,	" 1876.
Hon. Sir J. C. MATHEW, ¹²	" 1881.
Hon. Sir HENRY MATHER JACKSON, ¹³	" "
Hon. Sir LEWIS W. CAVE, ¹⁴	" "

1 Died November 20, 1880: 16 L. J., 576, 589; 15 Am. L. Rev., 184.

2 Appointed to fill vacancy occasioned by death of Lord COCKBURN.

3 Resigned June 11, 1879: 14 Law Jour., 365; 67 Law Times, 127.

4 Died December 27, 1881: 72 L. T., 145, 173; 16 L. J., 624; 17 L. J., 6.

5 Appointed June 11, 1879: 14 Law Jour., 365; 67 Law Times, 127—transferred to Court of Appeal, June 1, 1882.

6 Appointed in place of Mr. Justice LINDLEY. Sworn in November 1, 1881: 72 L. T., 1, 12. Promoted to Chancery Division, April 10, 1883: 18 L. J., 205, 215.

7 Appointed January 10, 1882: 17 L. J., 15, 33; 72 L. T., 181. Died May 24, 1882: 17 L. J., 275; 73 L. T., 71; 73 L. T., 87; 17 L. J., 289.

8 Appointed June 5, 1882: 18 L. J., 319; 73 L. T., 91.

9 Appointed April 10, 1883, in place of Mr. Justice NORTH, promoted to Chancery Division: 18 L. J., 205, 215, 239.

10 Appointed to fill vacancy occasioned by death of Lord COCKBURN.

11 Promoted to Court of Appeal, October 29, 1881: 71 L. T., 409.

12 Appointed March 1, 1881: 16 Law Jour., 108.

13 Appointed March 1, 1881: 16 L. J., 108. Died March 12, 1881: 16 L. J., 113.

14 Appointed March 26, 1881, to fill vacancy occasioned by death of Mr. Justice JACKSON: 16 Law Journal, 123.

EXCHEQUER DIVISION.

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Hon. Sir JOHN WALTER HUDDLESTON, " 1875.

Hon. Sir HENRY HAWKINS, " 1876.

Hon. Sir JAMES FITZ-JAMES STEPHEN,³ " 1879.

COURT OF APPEAL IN BANKRUPTCY.

The Ordinary Judges of the Court of Appeal.

PROBATE, MATRIMONIAL, DIVORCE, AND ADMIRALTY DIVISION.

Right Hon. Sir JAMES HANNEN (President), appointed 1872.

Right Hon. Sir ROBERT J. PHILLIMORE,⁴ " 1876.

Right Hon. Sir CHARLES PARKER BUTT,⁵ " 1883.

CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

¹ Died September 18, 1880: 15 Law Jour., 459; 69 Law Times, 359, 367.

² Resigned January, 1879: 14 Law Jour., 15; 66 Law Times, 191.

³ Appointed January, 1879, in place of Baron CLEASBY: 14 L. Jour., 34; 66 Law Times, 191.

⁴ Retired March 21, 1883: 74 L. T., 383.

⁵ Appointed March 26, 1883: 74 L. T., 383; 18 L. J., 169, 181, 239.

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APPEAL CASES
BEFORE THE
HOUSE OF LORDS
(ENGLISH, IRISH, AND SCOTCH)
AND THE
JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL.

[5 Appeal Cases, 623.]

H.L. (E.), June 15, 17, 18, 1880.

[HOUSE OF LORDS.]

***MARIA MANGINI STURLA and Others, *Appellants* ; [623
and FILIPPO TOMASSO MATTIA FRECCIA AUGUSTUS KEP-
PEL STEVENSON and Others, *Respondents* (').**

Evidence—Public Document—Statements in.

The report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the government, is not necessarily admissible in the courts here, as evidence of all the facts stated therein.

M., the consul in London for the then Genoese Government, applied in 1789 to his government to receive the rank and employment of diplomatic agent here. The executive government (Collegii) referred the application to a committee called the Giunta della Marina to inquire into the propriety of the proposed change of appointment, and into M.'s fitness for the post of diplomatic agent. The Giunta reported favorably on both points. In the course of the report the Giunta described him as "a native of Quarto, of about forty-five years of age." He was appointed in 1790, and died in England in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the Crown, but, on a process instituted here, a decree was made directing payment of the fund to certain persons of the Freccia family, who claimed to be next of kin, and whose claim was founded on an allegation that M. had been born at St. Ilario near Genoa in 1735.

(') Affirming 12 Chan. Div., 411.

1880

Sturla v. Freccia.

H.L. (E.)

Other persons then claimed to be next of kin, asserting that M. had been born at Quarto in 1744. In a suit between these two sets of claimants the report of the Giunta was tendered in evidence as fixing the real place and time of M.'s birth :

Held, that it was not admissible for that purpose.

Per Lord Blackburn: "A public document" means a document that is made for the purpose of the public making use of it—especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it.

APPEAL against a decision of the Court of Appeal, which had affirmed a previous decision of Vice-Chancellor Malins (1). The facts of the case are fully set out in the report [624] in the court below. *The following summary of them is all that is necessary for the present report.

A Mrs. Mangini Brown died in London intestate on the 21st of December, 1871, leaving personal estate to the amount of £200,000. She was a widow above ninety-three years of age. It was not known whether she had any relatives, and her estate was therefore taken possession of by the then Solicitor to the Treasury, Mr. Gray, on behalf of the Crown. A suit was subsequently instituted by persons of the Freccia family, who claimed to be Mrs. Brown's next of kin. Mrs. Brown was the daughter of Antonio Mangini, who in the early part of his life had been consul in London for the Ligurian Republic, and in March, 1876, the Chief Clerk (to whose examination the title of the claimants had been referred) made his certificate declaring that Antonio Mangini was a native of the village of St. Ilario near Genoa, and was, in 1735, baptized there as Antonio Mangini, the son of Giovanni Battista Mangini, and that the members of the Freccia family were the next of kin. The court, on farther consideration, made an order in favor of that family. Before that order was acted on fresh claimants appeared, now represented by Madame Sturla and the other appellants, and the case they set up was that the consul was one Antonio Maria Mangini, and was born at Quarto, near Genoa, in 1744. On reference of this new claim to the Chief Clerk for examination, he reported adversely to it, and the court then made a fresh order on the original certificate, and some of the fund was paid out under this order.

An action (*Sturla v. Freccia*) was then brought to determine these adverse claims, and the chief point in dispute related to the identity of Antonio Mangini and the place of his birth, whether St. Ilario or Quarto. On the evidence proposed to be given in that action, the present question arose.

(1) The case is reported in the courts below under the names of *Polini v. Gray* and *Sturla v. Freccia*, 12 Ch. D., 411.

It appeared that on the 26th of June, 1789, Consul Mangini applied to his government to be appointed the diplomatic agent of the Republic. The letter of the consul, making the application, was referred by the Collegii to the Giunta della Marina. This Giunta was a body of officials consisting of three members, one selected from the senate and two others from the Camera or finance division of the government. The report of the Giunta, *dated in [625 March, 1790, began by referring to the details of the business required to be performed in London, and stated how much more advantageous it would be for the government, if that business was intrusted to a diplomatic agent than merely to a consul, who held no diplomatic position. It then referred to some occasions on which Antonio Mangini had well exerted himself in the business of the government, spoke of his disinterestedness in not having his postage expenses repaid him, and mentioned that it had again been commanded to obtain more precise information respecting Mangini, and proceeded thus: "Consul Mangini is a native of Quarto, aged about forty-five, of civil extraction, and while still young, wishing to try his fortune abroad," went to Lisbon, engaged in commerce there, then went to London and engaged in commerce there; and the report went on to give details of his life here, saying that "Every Genoese who arrives in London and inquires about him is treated by him with courtesy" ("*lo tratta con proprietà*"), and it gave details of his becoming rich, living in good style, and speaking several languages, and concluded by recommending him for the appointment of diplomatic agent. He was appointed by a letter patent signed by Borelli, Secretary of State, and dated the 16th of April, 1790; and he lived here till his death, which happened in 1803. This report of the Giunta was offered as evidence to prove that the consul had been born at Quarto. Its reception was objected to, and Vice-Chancellor Malins declined to receive it as "evidence as to the place of the birth or the age of the consul." The decision of the Vice-Chancellor was affirmed by the Lords Justices, and hence this appeal.

Mr. J. Pearson, Q.C., and Mr. Wills, Q.C. (Mr. Edward Beaumont was with them), for the appellants: The court below wrongly rejected a document which on every legal ground was admissible in evidence. There could be no reasonable ground for doubting that it was a perfectly genuine document. Assuming that to be so, then it was admissible by the laws of this country as a report made by public officers to their superiors, upon a matter which concerned

the public service of the country, and which had been referred to them for inquiry. The *report was therefore essentially a public document, and required that credit should be given to its statements. [LORD BLACKBURN: The Giunta satisfied itself that Mangini was a respectable person fit to be put into the employment he asked for, that was the matter specially referred to the Giunta,—do you say that that makes all the rest of the document admissible in evidence?] Certainly. The document is a public document and the whole of it is admissible. The government acted upon it. The report was part of the transaction of the appointment to the office, and so admissible: *Collins v. Maule* ('). The certificate of the Secretary at War has been received to prove that a man was a serjeant in the army and so free under the Mutiny Acts from arrest: *Lloyd v. Wooddall* ('). In *Stead v. Heaton* (') entries by parish officers of proportions of church rates received by them were not only admitted as evidence of the fact of receipt, but as evidence to explain and settle the proportion. In *Price v. Littlewood* (') Lord Ellenborough admitted old entries in a vestry book signed by the churchwardens, as evidence to establish a claim of title to a pew in the church of Hendon, observing that the entry was made by the churchwardens on a matter within the scope of their official authority. And even a verbal statement as to the amount of rent, made by the man who paid it, to his son, was, after that man's death, admitted in a case relating to the settlement of a pauper: *The Queen v. Birmingham* ('). Entries made in the usual course of business are admissible: *Doe v. Turford* ('); *Pritt v. Fairclough* ('). [LORD BLACKBURN: Must they not be made at the time and in the discharge of the particular duty: *Smith v. Blakey* (').] And the post-mark on a letter posted in Essex, marked there, and forwarded to London on its way to Scotland, and produced with the proper post-marks on it, was received as evidence of a publication in Essex, and that it had reached its destination in Scotland: *Warren v. Warren* ('). And corporation books are admissible as public documents ('), the *principle being, that entries made by persons discharging a public duty, and in discharge of that duty, were afterwards admissible to prove the facts therein stated. As to documents kept in

(') 8 C. & P., 504.

(') 1 W. Bl., 29.

(') 4 T. R., 669.

(') 3 Camp., 288.

(') 1 B. & S., 763.

(') 8 B. & Ad., 890.

(') 3 Camp., 305.

(') Law Rep., 2 Q. B., 326.

(') 4 Tyrw., 850; 1 C. M. & R., 150.

(10) Taylor on Evidence, 7th ed., s. 1781, p. 1484; Hub. on Suc., 587; *Rex v. Mothersell*, 1 Str., 93.

public offices in this country they had constantly been received in proof of the facts stated in them. A bankrupt register is so : *Arnold v. The Bishop of Bath and Wells* ⁽¹⁾. In *The Irish Society v. Bishop of Derry* ⁽²⁾ entries in the books kept at the First Fruits Office were admitted to prove a collation to a living made by the bishop at a particular time, and so also were returns made by him in obedience to writs from the Exchequer requiring him to state the vacancies of, and presentations to, the livings in his diocese. They were statements made by a public officer in the discharge of a public duty. Inquisitions *post mortem* are always admissible, for the reason that they are made under commissions from the Crown. In *Burridge v. The Earl of Sussex* ⁽³⁾ a deed of entail of an estate was recited in an *inquisitio post mortem*, which was not only admitted to prove that there had been such a deed, but, the particulars of the deed being recited therein, it was received as proving those particulars. Such inquisitions were always received in evidence in peerage cases in proof of pedigree. [Many peerage cases were referred to in proof of this statement, among these were *The Lumley* ⁽⁴⁾; *De Roos* ⁽⁵⁾; and *The Slane* ⁽⁶⁾ claims of peerage.] In the case of the *Earldom of Devon* ⁽⁷⁾ an *inquisitio post mortem* was admitted in proof not only of a title to lands and advowsons, but also to show by whom and in what manner they had been dealt with.

In like manner the herald's visitations are admissible to prove pedigree : *Stainer v. Droithwich* ⁽⁸⁾; *Pitton v. Walter* ⁽⁹⁾; *Matthews v. Port* ⁽¹⁰⁾. These were cases at law. And in *Vernon v. Manners* ⁽¹¹⁾ the heralds' books were admitted to prove "cosinage" [relationship] on a question of challenging the array. So that *the observation of [628 Lord Justice Brett in the present case ⁽¹²⁾, that their admissibility is peculiar to committees for privileges, is entirely inapplicable. And in the *Shrewsbury Case* ⁽¹³⁾ it was shown how careful were committees for privileges in these matters, for there one visitation was refused to be received because the commission under which it was taken was not produced, and another was admitted because the proof of the commis-

⁽¹⁾ 5 Bing., 316. See *Bishop of Meath v. The Marquis of Winchester*, 4 Cl. & F., 445.

⁽²⁾ 12 Cl. & F., 641.

⁽³⁾ 2 Ld. Raym., 1292.

⁽⁴⁾ 1723, 22 Lords' Jour., 299.

⁽⁵⁾ 1804, Min. of Ev., 389.

⁽⁶⁾ Min. of Ev., 1830-1835, 13; 5 Cl. & F., 38-39.

⁽⁷⁾ Sir Harris Nicolas' Report, Append. xxiv.

⁽⁸⁾ 1 Salk., 281.

⁽⁹⁾ 1 Str., 162.

⁽¹⁰⁾ Comb., 63.

⁽¹¹⁾ Plowd., 425.

⁽¹²⁾ 12 Ch. D., at p. 433.

⁽¹³⁾ 7 H. L. C., 1, at p. 34.

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sion and the deputation to the heralds, had been supplied ('). And in the *Attorney-General v. Kohler* (') it was expressly declared that the rules of evidence in pedigree cases had not been relaxed of late years. In all these cases the findings were those of official persons having authority to perform a duty and acting in obedience to the authority conferred on them.

Even decisions in the Courts of Chivalry were recognized, though it might perhaps be said that they were not regularly established courts, but were, in fact, only special commissions. [LORD BLACKBURN: It is said in Comyns' Digest (') that "the Court of Chivalry has an absolute jurisdiction by prescription in matters of honor, pedigree, descent, and coat armour," and a case in Modern Reports is quoted as the authority (').]

Funeral certificates produced from the Herald's College, taken by the Officers of Arms under orders from the Earl Marshal, are admissible in evidence to prove the facts stated in them: *The Vaux Peerage* ('). The reason being that the certificates were made by official persons in the discharge of the duties of their office. Such persons have a duty to perform and have no interest to misrepresent. [LORD BLACKBURN: That goes to the weight of the evidence, not to its admissibility.] But where an entry was recorded by an appointed official not in the discharge of his duty, that entry, though produced from the proper custody, would not be admissible in evidence, for it must be made in discharge of a duty, that distinction being taken more than once in the *Shrewsbury Peerage Case* ('). But these conditions being complied with it is admissible to prove the facts stated in it.

629] *The recitals in private acts of Parliament as to property were once admissible: *The Wharton Peerage* ('); though they are not so now, because those acts are no longer submitted to the previous adjudication of the judges: *The Shrewsbury Peerage Case* ('); while they were so they had a very high authority (').

It is submitted, therefore, that this document being a report made by a public body on a matter into which that body was directed to inquire—made to the government of the Republic and acted on by that government, is a public

(1) 7 H. L. C., 1, at pp. 27, 24.

(2) 9 H. L. C., 654.

(3) Tit. Courts, E., 2.

(4) *Russell's Case*, 4 Mod., 128.

(5) 5 Cl. & F., 526-541.

(6) 7 H. L. C., 1.

(7) 12 Cl. & F., 295.

(8) Per Lord Lyndhurst, L.C., *Wharton Peerage Case*, 12 Cl. & F., 302.

document of State, to which credit is to be attributed, and is admissible in evidence to prove the facts stated in it. All the reasons which render public documents in this country admissible in the courts here, apply in full force to this document, which ought therefore to have been received, and was improperly rejected.

Mr. *Napier Higgins*, Q.C., Mr. *Bagshawe*, Q.C., Mr. *Everitt*, and Mr. *Benjamin Eyre*, appeared for the respondents, but were not called on to address the House.

Mr. *Rigby* was for the trustees of the fund.

THE LORD CHANCELLOR (Lord Selborne): My Lords, the question on this appeal is one as to the reception of evidence. The document in question, a report of certain persons called the *Giunta di Marina*, at Genoa, is sought to be put in evidence for the purpose of proving that a person who was formerly consul for the Genoese Republic in London, and the succession to whose daughter, Mrs. Brown, is now in question, was a native of Quarto near Genoa, and at the time that report was made, aged about forty-five years. The document has been tendered for that purpose and for that purpose only.

My Lords, upon that question of evidence it is that we have heard an argument at very great length, the case having been very ably presented on the part of the appellants. I believe none of your Lordships thinks it necessary to hear the respondents on that point. The evidence has been rejected by the courts below, *and I think all your [630 Lordships are of opinion that its rejection was unavoidably necessary, by reason of the rules applicable to questions of this kind, in the law of England.

There is abundant proof that the report, which contains the passage it is desired to use, is an authentic public document of the Genoese Government, to which, so far as the good faith of those who made it is concerned, credit might be justly given on any occasion on which it might properly be used. But your Lordships, in this case, have to consider what is the nature of that report, and how far the statements contained in it can be brought within the rules of the English law of evidence as to the proof of pedigree.

The nature of the report is this: Mr. Mangini had been consul in London for about ten years, and desired to be advanced to a somewhat higher authority as agent of the Republic. He had made application in writing for that appointment. He was at that time, and he remained afterwards, in London. There is no evidence before your Lordships as to any relatives of his at Genoa having had anything

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to do with the statements contained in this report, nor is there any evidence to connect any of those statements with representations proceeding directly from Mr. Mangini himself. The public authority at Genoa, with whom rested appointments of this description, was called the Collegii, being in point of fact, a joint assembly of certain members of the executive government of Genoa and the Senate. With them appointments of this description appear to have rested. It seems to have been a common practice of theirs (whether universal, I will not assume one way or the other,) to refer applications of this kind to a species of executive sub-committee, which was called the Giunta di Marina, or Navy Board. Why it was so called does not very clearly appear. That committee was composed, if I am not mistaken, of two members of the senate and one of the finance board. The nature of the reference appears upon the face of it. It was to learn what could be known about the fitness of the person who had made application for the appointment in question, and to report the result to the Collegii, with whom the appointment rested. In fact it was an executive sub-committee to assist a department of the government, by collecting and reporting information, either as to applicants for public appointments generally, or as to applicants for appointments of this particular kind.

631] *It does not appear that any particular rules were prescribed to them as to the kind of information which they should collect; still less as to the evidence which they were to require to substantiate such information. What the law of Genoa as to legal evidence may be, we do not know; and certainly there is nothing here from which we can be entitled to assume that it is the same as the law of England upon matters of this kind. Whatever it is, there is nothing to lead to the conclusion that, in the discharge of this particular duty, the persons composing the sub-committee of the executive government of Genoa were bound to confine themselves to any particular description of evidence, whether of that kind which the law of Genoa would be satisfied with in judicial proceedings, or of the kind which the law of England requires in such proceedings; and to assume, in point of fact, that they were obliged to limit themselves to that sort of information which we should regard as evidence, in matters of this description, in the courts of this country, would be, to say the least, a violent and unreasonable supposition.

The report which they made contains the history of what they had collected, in some way or other, as to the life of this gentleman. I have no doubt whatever that they re-

ceived information, which they thought was correct, upon all the points comprehended in that report; but whence that information was received does not at all appear; certainly it does not appear that it, or any part of it, was received from any member of Mr. Mangini's family. We may conjecture, not unreasonably, that if this committee in Genoa was acquainted with members of the Mangini family resident in or near that city, it may have had recourse to them; but there is nothing to show that in point of fact this was done, or that there were no other means by which the Giunta might have obtained such information as is contained in the report. If your Lordships look through that information, you find it concludes by stating that every Genoese who, during the time Mr. Mangini had been consul in London, had occasion to ask for his good offices, had been received by him with courtesy and hospitality, and was very well satisfied with the manner in which Mr. Mangini discharged his duties as consul. The Giunta, therefore, had probably been in communication with some persons who had become acquainted with Mr. Mangini, in the discharge of his [632 duties as consul in London, and there is nothing to show that all the information received may not have been obtained from some such persons; and, if from them, there is nothing to show whether those persons obtained the information from Mangini himself, or from others who were acquainted with him and talked about him. There is nothing to show that at that time there were not people living at Genoa who, though not his relations, were more or less acquainted with Mr. Mangini, who might have heard these things from others, and from whom this information might have been obtained. That those persons obtained their information from the members of Mangini's family, or from Mangini himself, is of course quite possible;—it may be so, but that is a mere conjecture, which has no element of reasonable certainty about it. If, therefore, it is necessary that the information received by the Giunta which is contained in this report should be founded on statements proceeding from Mangini himself, or from some member of the family to which Mangini belonged, to make it admissible in evidence for the purpose for which it is tendered, there is not anything either in the nature of the case, or in the tenor of the report itself, or in any other evidence which has been brought to your Lordships' knowledge, to lead to that conclusion; and, my Lords, I am of opinion that it is necessary, by the law of this country, in order to make this report receivable in evidence, that it should at least appear to have been founded

upon statements made by members of Mangini's family or by Mangini himself.

My Lords, several classes of cases in which evidence, not depending upon the oath of persons who have personal knowledge, is received in matters of pedigree, by the law of this country, have been referred to at your Lordships' bar. It appears to me that none of those classes of cases has really any tendency to support the appellants' proposition. Two of them may be laid aside at once—those which consist of declarations made against the interest of the persons making them—and those which relate to entries made in the course of business by persons whose duty it was to make those entries. They may both be laid aside; because, besides other conditions to which I need not particularly 633] advert, *they both involve this, as a necessary element, that the subject-matter of the declaration in the one case, and of the entry in the other, must have been within the direct personal knowledge of the person making the declaration, or making the entry. That can have no application here.

Then, my Lords, other classes of cases were referred to, namely, the findings of competent public officers, courts, or persons having legal jurisdiction to inquire, under public authority, into matters within that jurisdiction; as in the cases of inquisitions and visitations of heralds under commissions from the Crown. I do not, my Lords, think that cases of that kind have any bearing at all on this matter. It does not appear that this Giunta di Marina had any legal jurisdiction whatever. Its members were not in the nature of a court, not in the nature of persons who, like the heralds, had authority by law, for a public purpose, to make particular inquiries, whose duty it was, in the exercise of that authority, to proceed upon just proof, and who may be presumably supposed to have discharged that duty properly, and to have taken such proof, and only such proof, as the law of the country required concerning the several matters before them.

Another species of evidence was referred to, analogous to that, but distinguishable from it; namely, funeral certificates entered in the heralds' books. They stand upon this ground. It was the official duty of the heralds to receive such certificates from persons who were by law competent witnesses, and to record the statements of those persons in their books. Therefore, from the fact of their being so recorded it is reasonably to be presumed, that the duty was duly discharged; it is evidence, that they did receive from

persons, who were competent witnesses, such declarations. To go now into particular cases, and to consider whether or not the evidence of books or documents of that nature should have been received in any particular instances which may be more or less open to criticism, appears to me to be unnecessary. This case is quite different. This Giunta was not a body which had any such legal jurisdiction; it was not a body which is shown to have been, or which can be presumed to have been, bound to proceed on any such kind of proof. It appears to me to have been perfectly open to its members to receive any species *of information, [634 on hearsay or otherwise, to which they themselves at the moment thought credit could be given; and, therefore, I am unable to apply to them any analogy derived from the cases of courts, commissioners, or other persons having a special duty or authority under the English law to make particular kinds of inquiries, to whose inquests or recorded proceedings credit is *prima facie* given.

My Lords, I do not think it is necessary to dwell farther upon the case. Some ground must be shown for the reception of a document of this kind as evidence. It appears to me, my Lords, that no ground has actually been shown, and under the circumstances I think your Lordships must decline to receive it. Of course that does not necessarily dispose of the case; although, from what we have heard at your Lordships' bar, it is not improbable that in effect it may do so.

LORD HATHERLEY: My Lords, I am entirely of the same opinion as that which has been expressed by my noble and learned friend.

I have anxiously listened to see whether or not there was any case made by the appellants which could at all be brought within the range of the now very numerous authorities which have settled and determined, with tolerable precision, the rule to be adopted with reference to evidence which may come within the class of hearsay evidence, for it really amounts to no more than that. The exceptions which have been made I need not go through or attempt to classify.

When you come to look at the character of the document which is sought to be produced, what do you find? There are no original entries to be found in that document, but there appear to have been books kept, although we have not any very precise information about how they were kept or whose duty it was to keep them, and the like; but they were kept on behalf of a body called the Giunta di Marina, which body was selected by the Senate to make certain

inquiries as to such particular things as they thought it necessary to inquire into; and on those they reported. In this instance they reported upon a reference made to them to learn something about the antecedents, the character, and 635] *the then present *status* of Mr. Mangini, who was serving in a certain capacity, in fact as consul, in this country, for the republic of Genoa. He was anxious to advance himself in his vocation by acquiring a higher authority. He was anxious, therefore, to obtain from the Senate the distinction of being called agent of the republic instead of bearing the simple name of consul, a point which he thought would lead to some advantage in his position on the one hand as regarded himself, and on the other hand as regarded his influence at the court to which he was accredited. The Senate referred this matter to the Giunta, and desired that body to get more information (for that is what it really amounts to) about his position and character. The consequence would be that they would have to report, which they subsequently did.

The question now is how far the report which they so made can be put in evidence in proof of facts which are narrated in it, not as specific findings, important and essential to the duty they had to perform, but simply as part of the narrative upon which their recommendation is finally made.

The class of cases that come most near to this, are those in which persons made entries consistently with a duty imposed upon them, and made those entries (as it was held in *Doe v. Turford* ⁽¹⁾, they must do to make them evidence) at the time of the duty being performed. In the particular case in which the document is brought forward on the present occasion, these two things are sought to be proved by the introduction of the document by way of evidence, viz., that there is mention of Mangini having been born at Quarto, which is a place near Genoa, and of his age at that time.

It is important in the case pending between these parties at this moment, with reference to this large sum of money, £200,000, left by Mrs. Brown, to prove that he was born at Quarto. But when you compare the great importance of that statement with the place it occupies in the report, certainly it is impossible to be much impressed in favor of an inquiry, such as is usual in pedigree matters, having been had recourse to by the tribunal, or committee, as I would rather call it, which had been formed, for it is simply mentioned incidentally, as a part of the description of this 636] *gentleman, that he was born at this place called

(1) 3 B. & Ad., 890.

Quarto—a matter which is not of the slightest importance with regard to anything they were investigating or directing their particular attention to at that time.

It is also said, and with more plausibility undoubtedly, that the question of his age, which is also sought to be proved by putting in this document, was one of more immediate reference to the duty the Giunta was then engaged upon. If you were to refer to anybody, to give an account of all they knew of somebody who offered himself for your service, whether it be public or private service, the probability is, that among other things, the age of the person concerned would be one of the points which you would wish to have information upon. The place where he was born you would probably care little about, at least in a case situated as this is, and with an employment of the character he was seeking, viz., agent instead of consul in England.

But, my Lords, this point of the age, although it comes in incidentally among the numerous matters they may have inquired into, is not the main or the direct point in issue between the parties. It might make a great difference in collateral matters, which they say they are prepared to prove in consequence of the discrepancy of age between one claimant of this man's property and the other claimant of this man's property. The present suitors say that the point as to age is of considerable importance, but to the Senate, who made the reference to the Giunta, of course a difference of five or six or seven years, would be a matter of very slight importance—if any at all—or it might even have been omitted altogether. Probably, as the man had been in their service before his election to his office, it would have had exactly the same result as it did have, for there is no reason to suppose that his election turned in any way on the age of the party brought forward.

On the other hand, my Lords, see what difficulty you get into with regard to the extension of the law as to hearsay evidence—in which you cannot be too particular—if you admit such a document as this to be received as evidence. It appears to me, as I said before, that the Giunta was simply a committee. If the document were admitted you might take a committee of any *public body as making [637 statements which you would be entitled to bring in to prove collateral matters which happened to form part of the statement; and if you are to be at liberty to make this statement evidence, you would thereby extend the rule laid down in *Doe v. Turford* (1) in a most alarming degree. You would

(1) 3 B. & Ad., 890.

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extend it to committees of all public bodies, all municipal corporations—to the reports of the committees of the common council of the city of London, to the reports of the town councils in all the different departments of the kingdom—all these might be brought forward as containing statements which it might be assumed were to be inquired into, and so be made part of the evidence in any particular case.

Now, my Lords, what proof have we in any way of any such steps having been taken by this Giunta, as would be required in order to establish the fact by way of proof, or to establish evidence of any value whatever, with reference to the particular controversy which is now going forward. Many other cases must have been inquired into besides that of this gentleman. Some questions put by my noble and learned friend on my left will show at once into what sort of inquiry you may be launched in matters of this kind. You might take eight, nine, or ten different candidates for an office at the disposal of some municipal corporation, and a reference by the corporation might be sent to a committee of its own body to report which was the best candidate, and among other matters in bringing forward a report of the committee to the employers, you might find a statement of the age of the person whose appointment is in question.

In this case I must say that I have looked in vain for any evidence of there being any investigation such as could be denominated, in any sense according to our views, evidence, in this country. So far from it being shown that the Giunta took any steps by the examination of witnesses, or the like, or the examination of baptismal certificates, or by inquiring from any member of the family so that the declaration of that member might be treated, although not on oath, as a declaration that might be introduced, there is not only nothing of that kind established before us, but on the contrary, from what we know of what took place in some [638] *similar matters, in the reports of commissions which were directed to some particular end, and happened casually to mention certain events, we know pretty well that no such rigorous investigation was entered into in those cases. There is not much probability that they had called together witnesses from the family and had inquired where he was born, what was his age, and the like, those being the best persons to know anything at all on the subject. Not only is there no evidence on the subject, but there is nothing to lead one to presume that any such step was taken.

Then, my Lords, I do not think this comes near the case of the heralds' books, nor the commissions for making specific inquiries, these specific inquiries falling plainly under the head of a discharge of a duty, which duty is discharged in the only proper manner in which it could be discharged, and, therefore, the law taking notice that such had been the course of investigation and inquiry, and such had been the result of the due execution by the commission of that duty, gives credit to what the return states upon the matter; although even there the extent to which evidence has been admitted seems to be limited by *Doe v. Turford* (*), and very narrowly limited, to the question itself, and the actual certainty of its being an entry contemporaneous with the duties so discharged. That case has been still more narrowed (some think, perhaps, too much so, and others not enough) in *Chambers v. Bernasconi* (**).

But here there is nothing approximating to any one of those cases, and, if you accepted the argument on behalf of the appellants, you would at once have a flood-gate opened to a large mass of documents which are not always remarkable for the ascertainment of truth—public commissions, and so on, without the least narrative of how those reports were arrived at, or the evidence on which they were arrived at, or anything whatever to satisfy you that you had an authentic report made by the persons in the discharge of a duty, and the report entered at the time the duty was discharged.

My Lords, I should have been glad to find any case that would have assisted in the investigation of truth, because one is very grieved at all times to be obliged to enter upon the consideration *of the admission of evidence with so [639 much caution and so much suspicion. But unfortunately the habits of mankind are not such, at present, as to lead one to desire any extension of the privilege of having evidence given and taken as part of the *res gestæ* of that which is sought to be proved, when you do not find any of the ordinary safeguards of evidence, namely, the examination of witnesses in person. There is no such safeguard as that, and no power of cross-examination, and it is only from the difficulty which has arisen in some particular cases from adhering with the utmost rigor to the rules with regard to hearsay evidence that, in the classes of evidence which I have been referring to, and which have been cited before us in argument, exceptions from the rule applying to hearsay evidence have been established. My Lords, I do not think we ought, in

(*) 3 B. & Ad., 890.

(**) 1 C., M. & R., 347; 4 Tyr., 531.

a case of this character, to extend the exceptions to cases where we have never yet found them applied, and when it is so easy to foresee extreme hardship, and possibly utter failure of justice, which would arise from such an extension of the exceptions. I think, therefore, my Lords, on the present occasion the course which the court below took in excluding this document was right, and I, therefore, concur in thinking that the decision of the court below ought to be affirmed.

LORD BLACKBURN: My Lords, I am also of the same opinion. In deciding the present question I assume—what I believe is a matter of controversy—that this document is a genuine document, actually being what it purports to be, and satisfactorily proved to be what it purports to be.

My Lords, having stated that, I inquire whether or not it is admissible evidence, (its weight is another question,) to prove that the consul Mangini, about whose next of kin the inquiry is, was born at Quarto in a particular year. That is what it amounts to in the result. It may be some evidence of more or less weight tending towards that, but I do not think it is evidence of it, and I will proceed to state the reason why.

I shall not attempt in so doing to enter upon a full inquiry into the law of evidence. I do not believe it would be possible, and I do not believe it would be proper in such a [640] case, because one *might be inadvertently ruling disputed points. But, so far as it is necessary to decide this case, one must express an opinion. It is not disputed that the general rule of English law is that hearsay evidence is not receivable, one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more, probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those.

Now, my Lords, the first and one of the most important exceptions is briefly expressed in a dictum in *Higham v. Ridgway* ⁽¹⁾, that documents on the face of them appearing to be against the interest of a deceased person who stated the matter, are evidence. I need not enter into the qualifications of that farther than to point out that in no point of

(1) 10 East, 109.

view can this Giunta di Marina who made this statement (and who presumably are all dead by this time) be said to have been making statements against their own pecuniary interests.

Then, my Lords, there is a second class of cases, of which *Price v. Lord Torrington*⁽¹⁾ may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There again I do not go into the qualifications, or express any opinion upon the different matters introduced, farther than to point out that in no sense can it be said that the Giunta di Marina was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle.

Then, my Lords comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible—where it is a public right or a *quasi* public right, evidence of reputation is admissible if you prove that the *deceased person was of the [64] class who would know it, and had stated it. Upon that again I merely say that the question we are now inquiring into, viz., the history of a private individual, is not a matter in which, in any sense, reputation generally can be received.

Then, my Lords, there is another class of cases which comes nearer to it. It has been established for a long while that in questions of pedigree,—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice,—but for whatever reason, the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognized them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.

(1) 1 Salk, 285; 2 Ld. Raym., 873.

Now if, in this case, there had been any evidence whatever showing that Mangini himself had told this Giunta di Marina that he was born at Quarto in a particular year, that would clearly have been evidence, if it was believed to be genuine; indeed it would have been almost irresistible evidence. But there is not the slightest pretence for saying he did so. His written communication to the Genoese Government does not say a word about where he was born, or his age. He did not think it material or necessary when he was seeking to be appointed agent, to tell them. If it could be shown that the Giunta di Marina, when making this inquiry, and prepared to make this report to the government, had asked Mangini the question, the statement would have been taken as evidence to show that Mangini had said it. Or if it could be shown that the Giunta had asked other members of the family, and that they had said it; that might be evidence. It might be a question of how that could be shown, but if that was shown upon admissible evidence, then it would become a question *whether it would be itself admissible evidence on the ground that it was a statement by a member of the family. But there is no pretence for saying that any one of these things is proved. What does appear is that the Giunta, for some reason which I cannot tell, thought (I give them credit for really thinking so) that this Mangini had been born at Quarto, and was now forty-five years of age, and they wrote that down. Upon no principle that has hitherto been stated could that be admissible evidence.

But, then, there comes another class of cases on which the argument principally rested; for it is only within that class of cases that the learned counsel for the appellants in their able argument have made any serious struggle to show that this document is admissible. It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by quoting what Mr. Baron Parke said in delivering the opinion of the judges in the case of *The Irish Society v. The Bishop of Derry* ⁽¹⁾. His Lordship there says ⁽²⁾, "The fifth exception related to an entry in one of the books of the First Fruits Office of the collation and admission of John Freeman to the Rectory of Camus. Writs were issued from the Court of Exchequer to the bishops to ascertain the value of the first fruits and twentieths, and re-

⁽¹⁾ 12 Cl. & F., 641.

⁽²⁾ 12 Cl. & F., at p. 668.

turns were made by the bishops. Search for the writs and returns was made, and the book was offered as secondary evidence of returnus. We think the entry was properly received." That was the point decided—that the writs having been issued to the bishop to return the first fruits in his diocese, and the return of them being presumably lost, as it could not be found, the entry in the First Fruits Office (the copy of it) was good secondary evidence of the return. Of course, that involved in it that the return itself would be evidence. Then his Lordship says, "The writs related to a public matter—the revenue of the Crown, and the bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received. *It was con- [643 tended that the bishop could not be permitted to make evidence for himself" (that is one objection which he meets) "and, therefore, that the entry though admissible between other parties was not to be received for the bishop; and the case was compared to an entry in the book of a union, of a surgeon's attendance, *Merrick v. Wakeley* ('), and the receipt of a certificate in a parish book, *Rex v. Debenham* ('), which have been rightly held to be inadmissible for the surgeon in one case, or the parish keeping the book in the other. But neither of these was an entry of a public nature, in the proper sense of that word; the former was a memorandum, intended to operate as a sort of check to the surgeon, the latter a memorandum for the parish officer, concerning merely the particular parish and its rights with relation to another." Then he goes on to say, "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not." Then he puts the case of the person who made a marriage register turning out to be interested, and says that would not prevent the register being received as evidence.

Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested

(') 8 A. & E., 170.

(') 2 B. & Ald., 185.

in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be "public" within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or *quasi-judicial*, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That [644] may be said to be **quasi-judicial*. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.

In many cases, entries in the parish register, of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were "public" then, because the common law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible. I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept, as a register to be referred to, ever after.

Taking that view of the matter, I think it becomes clear that this document is not evidence. Supposing this inquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it would not be public in one sense, but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence, on the ground that a public officer, in making the statement for the public, was likely to speak the truth and must be presumed, *prima facie*, to have known and to have spoken the truth. I am not aware of any decision which says that, in such a case as I have supposed, the document

would be received. I do not believe any one has ever tried to put in such a document, and therefore I do not think there is or can be any authority to the contrary. Nevertheless that would illustrate the principle.

Every other case that I am aware of falls within the principles of one or other of the limitations I have stated. The visitations of the heralds were proof. There the Court of Chivalry was a *prescriptive court, and the object of [645 the Court of Chivalry and the inquiry of the heralds—I do not stop to inquire whether the heralds were independent officers, or a branch of the Court of Chivalry, and it matters not—the very object and purpose there was, that they should inquire into arms and pedigrees for the very purpose of making a register of them, and for both these reasons it is clear that, when the visitation of the heralds appointed for these purposes had been made, those things could be, and they always have been received as evidence. There seems to be some misapprehension that they were received in committees of privileges as to peerages on the ground that there was some peculiar rule there. They were received, as was proved by several of the cases cited, on trials at *nisi prius* where evidence of pedigree was required. Here I may observe that in all these cases, where you have got the means, by a public document, of proving a fact, the question whether that fact is of importance or not must depend on the subject of the inquiry. If the document proves that a deceased member of the family had authenticated a pedigree, of course that becomes as strong evidence as you can have, if pedigree was the subject of the inquiry there.

I rather think that in one or two of the cases mentioned in peerage inquiries about the funeral certificates, that was the ground of the decision. I rather think, but I should not like to be too sure about it, that the book of the heralds which was produced had a copy of all the certificates of the funerals which had been returned by those who attended the funerals; and the case in Shower's Parliamentary Cases (') shows what the practice was of heralds attending the funerals of great men. I think the effect of what was decided was that that was good secondary evidence of the certificate, just as in the case of *The Irish Society v. The Bishop of Derry* (") it was decided that the First Fruits Book was good secondary evidence of the returns. Then, it being established in the Peerage cases that there was a certificate signed as required by the Earl Marshal, by the

(') *Oldis v. Donmille*, Sh. P. C., ed. (") 12 Cl. & F., 641.
1698, p. 58, at p. 65.

executors, in both the cases which were cited, that certificate when produced did state on the face of it, that the executor who signed it was a near relation, *I think in the *Vaux Peerage* he appeared to be a son, and in the other he appeared to be a near relation, I say, taking them to be signed in that way, of course the document that was produced became extremely cogent evidence of pedigree. It would not probably have been evidence of any thing else—not of reputation. It might have been evidence of reputation where reputation was admissible, but it was only because pedigree was the subject of the inquiry.

Frequently in the cases cited, or many of them, half-a-dozen different reasons have been given, which might be all good or bad, for admitting the evidence. Take, for instance, the case in the third volume of *Campbell of Price v. Littlewood* (¹), where the question being about a private right to a pew, the judge admitted the entry and gave two reasons, saying, first of all, that it was evidence of reputation. I confess I think that was a mistake. I do not see how the ownership of a pew can be a matter of reputation; perhaps I am wrong. Then, secondly, he said that it was a public document. Now, I have considerable doubts whether the entry in the vestry there, was public enough to make it a public document, but it might be that the entry in the vestry was intended for the information of all the parishioners who liked to come and see it. Supposing, in the case of *Arnold v. The Bishop of Bath and Wells* (²), the entry had been made by the bishop on his visitation that such and such a man was the clergyman of the parish, and had been admitted some twenty years before, *secundum consuetudinem*, and suppose it was wrong to admit him, that falls completely within the principle which I think the case of the *Irish Society v. The Bishop of Derry* (³) establishes. It seems to me that it is clearly within that principle. The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent that it should be public.

Now, my Lords, taking all that into consideration, can the document in this case be said to come within that class 647] of cases? *I think it is impossible to look at it in that way. There is not the slightest evidence, or the least circum-

(¹) 3 Camp., 288.

(²) 5 Bing., 316.

(³) 12 Cl. & F., 641.

stance, to lead me to the conclusion that it was even intended that this private and confidential report should be seen by Mangini or anybody interested in it. It was meant for private information, to guide the discretion of the government.

It was not like the bishop's return of the first fruits, for the public information, to be kept in the office and to be seen by all in the diocese who might be concerned when there came to be any litigation. But this was meant as a private and confidential report, and it certainly seems to me according to common sense that it ought not to be received. But I base my judgment upon this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible.

LORD WATSON: My Lords, I also am of opinion that this document is not admissible as evidence. I listened with very great pleasure to the argument at the bar, which, so far as I was concerned, was a very instructive one; but I noted in the course of the argument, whilst the law on various points was very fully elucidated, the difficulty, that the appellants' counsel had to contend with throughout, was to bring the facts of their case within the rule of any of the authorities which were cited by them.

My Lords, I concur in the views which the noble and learned Lord on the woolsack and the noble and learned Lord opposite have expressed as to the difference between this case and the cases dealt with in those authorities. I do not think it necessary to make any farther reference to them, because, being of opinion that the present case is not ruled by them; I must deal with this case upon its own merits.

Now, my Lords, I have not been able to find in the authorities cited, any warrant for holding that secondary evidence is admissible according to the law of England, where there exists no reasonable presumption that the statement offered in evidence was derived, either from the personal knowledge of the party who made it, or *from some [648 legitimate source—I mean legal evidence. I think in all those cases where it is admissible, secondary evidence is admitted as a substitute for primary evidence, and can only be received when it plainly appears to be either directly drawn from that which would have been primary evidence, or drawn, not directly, but by some one competent to infer the result, from legal evidence under his consideration.

My Lords, one of these presumptions, I think, is excluded

by the circumstances of this case, I mean personal knowledge on the part of those members of the committee who drew up the report of 1790. On the other hand, it does not appear to me that either the terms or the character of the report, warrant the suggestion that there was legal evidence before the committee, upon which the members of that body arrived at the results which they reported for the benefit of those who were appointed to exercise an act of patronage.

My Lords, it does not appear to me that the duty cast upon the committee necessarily, or even by fair implication, involved the necessity of making any *quasi*-judicial or strict inquiry into the circumstances which they were about to report. I do not think that the duty cast upon them differs in the slightest degree from the duty which is incumbent upon every department of state, or individual officer of state, to whom is intrusted the patronage of government office. It is their duty to satisfy themselves that the person whom they are about to appoint is fitted and qualified for the office which they are about to confer upon him; and, where there are several candidates, it is their duty to make up their minds, upon a fair estimate of their various qualifications, which shall be preferred to the office. It is quite competent, as is the case here, for any person intrusted with the right of patronage to delegate that duty, as has been done here, but that does not appear to me by any means to alter the character of the duty, or the character of the inquiry which that duty involves, in order to its being satisfactorily performed.

Now, my Lords, I venture to say there is nothing here to suggest, and there is nothing in any analogous case in my power to suggest, which involves the duty of proceeding according to strict legal rules. The sort of commission that [649] was given here was one of a very roving description, to find out every little circumstance, whatever it might be, wherever they could pick it up, and in whatever manner they could ascertain it. Accordingly we were referred to various documents of similar character; and those by their tenor very strongly support the view that the inquiry made was of the character that I now state. They were not appointed to inquire into any specific fact; they were not appointed to inquire into age, or place of birth; and accordingly in many cases they obviously did not so inquire, as they do not report these particulars.

My Lords, I cannot conceive, when you take these circumstances into consideration along with the undoubted

fact that this was not made for the purpose of being recorded in a public register, that it can have the authority of a public register. No doubt the document survives, but the mere fact that a document intended for a temporary purpose of this kind, is found, after a long lapse of years in the archives of the government office, does not constitute it of the authority of a register. The purpose of this document was ephemeral, and was at an end the moment the appointment was made; and it would be a very singular fact if the law of England were to give such an authority to this one report, when the investigation in the cases of all the unsuccessful candidates, and the reports in their cases, must have been of precisely the same weight and authority as this; there is no difference between them. The results of the investigations, and the steps taken to investigate, appear to me to have been, in the case of Mangini at all events, entirely without the knowledge of the parties concerned.

I have no hesitation, under these circumstances, upon the facts of the case itself, and seeing that no direct authority can be adduced in support of the appellant's contention (and no authority which in my mind warrants the principle), in saying that this is a document which cannot be reasonably presumed to be founded upon legal testimony, and one which cannot be received in evidence. I fully concur in the result which your Lordships have arrived at.

Mr. *Pearson* intimated that he could not support the case if that document was rejected.

*Mr. *Higgins*: My Lords, there is a fund in court [650 of £2,000 which was paid in as security for costs. I do not know whether your Lordships can give any directions about that.

THE LORD CHANCELLOR: The appeal will be dismissed with costs. Any fund deposited by way of security for costs will remain in its present position until the costs are paid; and if the costs should not be otherwise paid, or if both parties should agree in an application to the appeal committee to deal with that fund, that would be the proper mode of doing it. I do not think that it would be the proper course for the House to make an order now.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 18th June, 1880.

A petition was afterwards presented by the respondents praying that the clerk of the Parliaments might be directed to pay the sums of £200 and £2,000, paid by the appellants into the Fee Fund as security for the costs of the appeal, to the respondent's solicitors on behalf of the petitioners, in part satisfaction of their costs, and the agents for the appellants consenting thereto, It was ordered as prayed.

House of Lords' Minutes, 16th August, 1880.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondents: *G. L. P. Eyre & Co.; Foster & Spicer.*

An authenticated copy of an instrument improperly admitted to record or not required to be recorded, is not admissible in evidence: *Coale v. Harrington*, 7 Harris & Johns. (Md.), 147, 155; 1 Greenl. Ev., §§ 493, 485, 498; 2 Phil. Ev. (Cow. & H. Notes), 5th Am. ed., 489, marg. p. 583; 1 Whart. Ev. (1st ed.), § 115.

A private writing deposited in a public office, pursuant to law, is not of the nature of a record, and cannot be proved as official papers may be, by a certified copy. When such writing cannot be removed from the office, it should be proved on a commission if out of the State, or by calling the subscribing witness and producing a sworn copy: *Bonchaud v. Dias*, 3 Den., 238, 241.

A certified copy of a chattel mortgage is not admissible in evidence until the existence of the original is proved: *Fellows v. Van Hyning*, 23 How. Pr., 440; *Bissell v. Pearce*, 28 N. Y., 252; *Hewett v. Morris*, 87 N. Y. Superior Ct. R., 18; *George v. Toll*, 39 How. Pr., 497.

The rule is the same as to a mechanic's lien: *Sampson v. Buffalo*, etc., 4 Thomp. & Cook, 600; *Baldwin v. Ryan*, 3 id., 253, 2 Hun, 512; *Jennings v. Newman*, 52 How. Pr., 282.

Though a certified copy is admissible to prove simply the act of filing: *George v. Toll*, 39 How. Pr., 497.

The authority of a deputy sheriff to bind the sheriff by his acts can only be proved by the production of his appointment as deputy by the sheriff, in writing, under his hand and seal. It cannot be proved by a certified copy of such appointment, nor by evidence that the deputy acted as such: *Curtis*

v. Fay, 37 Barb., 64; *Crowley v. Conner*, 1 City Cts. R., 162; *Von Beil v. Reilly*, 14 N. Y. Weekly Dig., 448.

The charter of the Delaware and Hudson Canal Company making no provision that a certified copy of the bond given by the company to a land owner, for the payment of damages to be assessed, etc., as provided in the twenty-second section of said charter, may be read in evidence, a copy is not admissible, if objected to.

Such bond being required to be filed with the county clerk, the county clerk's office is the proper repository, and the clerk's acceptance of the bond must, under the statute, be regarded as the acceptance of the party; although a delivery to the party would be good: *Selden v. D. & H. C. Co.*, 29 N. Y., 634.

When the law requires certain facts to be stated in returns by ward inspectors of elections, such returns are valid only so far as they are confined to the facts which the inspectors are required to set forth; and if they go beyond these and state others, such statements will be treated as mere surplusage: *Ex parte Heath*, 8 Hill, 43, 48; 1 Greenl. Ev., §§ 493, 485, 498; 2 Phil. Ev. (C. & H. Notes), 5th Am. ed., 489, marg. p. 583.

A book purporting to contain the proceedings of the commissioners of forfeitures, but not proved ever to have been in their possession, though found in the clerk's office in 1806, and having lain seventeen years there, is not admissible in evidence to show a sale by the commissioners: *Jackson v. Miller*, 6 Cowen's Rep., 751, affirmed 6 Wend., 228.

Stat. 52, G. 3, c. 146, s. 5, requires

parish registers to be kept at the parson's house or in the church. The custody of such registers by the parish clerk at his house is not, unless accounted for, such reasonably proper custody as to render receivable in evidence an extract made by a witness from a book produced to him as the parish register by the clerk, at the clerk's house: *Doe on the demise of Lord Arundel v. Fowler*, 14 Q. B. Rep., 700; Same case, 8 N. Y. Leg. Obs., 271.

In order to establish title to land, under a lease by the corporation of the city of New York, for non-payment of taxes, it is necessary to show that every prerequisite to the power to sell had been complied with.

Production of what purport to be the assessment rolls, without proof of their authenticity, or the genuineness of the assessors' signatures, is not sufficient evidence that the taxes therein mentioned were duly imposed: *Stevens v. Palmer*, 10 Bosw., 60.

The docket of a deceased justice of the peace, although evidence, in a subsequent suit between the same parties, to prove that a judgment was rendered by him, is not evidence in a suit between others, to show what constable served the summons, nor the amount of his fees. With respect to that matter the docket is *res inter alios acta*: *Reynolds v. Brown*, 15 Barb., 24.

Parol evidence that a soldier deserted from his regiment, given by private soldiers in the same company with him, is not admissible. Nor is a letter written by him at the time admitting his desertion. Such desertion can be proved only by the official record: *Terrell v. Colebrook*, 35 Conn., 188, S. C., 1 Alb. L. J., 164.

The certificate of a county clerk, held incompetent to prove the issue and return of an execution on file in his office. The execution with the sheriff's certificate indorsed thereon was the proper evidence: *Baldwin v. Ryan*, 3 T. & C., 251.

A certificate from the United States commissioner of patents that diligent search had been made, and that it does not appear that a certain patent has been issued, is not competent evidence of that fact: *Bullock v. Wallingford*, 55 N. H., 619.

Where the act required that the of-

ficers, to issue the bonds, should first file, with the written assent of the taxpayers, their affidavit that the persons, whose assent were thereto attached, comprised two-thirds of all the resident taxpayers, such affidavit is not evidence of the requisite assent in the absence of a provision of the statute making it such: *Starin v. The Town of Genoa*, 23 N. Y., 440; *People v. Mead*, 24 id., 114.

But see *Bank of Rome v. Village of Rome*, 19 N. Y., 20.

Defendants' counsel offered, in evidence, a newspaper account of the transaction, prepared from accounts received on the day and at the place of the accident. The author was examined as a witness, and testified he talked with plaintiff and others about it, and supposed he learned from them, but had no distinct recollection of what was said, and could not tell from whom, principally, he received his information: Held, the article was properly excluded: *Downs v. N. Y. C. R. R. Co.*, 47 N. Y., 83.

Evidence of the contents of the record of a deed is properly excluded, where it does not appear that the party could not produce the original deed, or had used due diligence to procure a certified copy. Parol evidence of the contents of a record of a deed from a different county than the one in which the land is situate, or of a certified copy thereof, is not admissible in evidence in any event. If a certified copy of such deed has been recorded in the county where the land lies, a certified copy from that record will be competent evidence, and so of the original deed: *Hardin v. Forsyth*, 99 Ill., 312.

The record kept by a person employed in the Signal Service of the United States, whose public duty is to record truly the facts therein stated, is competent evidence of such facts: *Evanson v. Gunn*, 99 U. S. Supreme Court Rep., 660.

Where an oath of office is filed in the office of the county clerk as required by law, properly certified by the clerk, is admissible in evidence in an action to recover the salary of the officer: *Devoy v. Mayor*, 35 Barb., 264.

In an action by a banking association, the original certificate recorded in the county clerk's office, with proof that it had done business and issued

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bills which were countersigned, is sufficient evidence of its due organization, without direct proof that a copy of the certificate had been filed with the Secretary of State: *Bank v. Willard*, 16 Abb. Pr., 111, affirmed 25 N. Y., 574.

A copy of the report of the State Engineer, made pursuant to a resolution of the legislature, certified by the clerk of the assembly, is properly received by the State board of audit, and is *prima facie* evidence of the quantity of work done and materials furnished: *Swift v. State*, 28 Hun, 508, 511, reversed, but on another point, 89 New York, 58.

A copy of a report of a railway company, to the State Engineer, in accordance with statute, duly certified by the deputy State Engineer, is competent evidence of a material admission made therein by the defendant as a corporation, with respect to the injury complained of: *Leonard v. N. Y. Cent.*, 44 N. Y. Super. Ct. R., 575, affirmed 80 N. Y., 659.

The commissioner appointed under the act of April 5, 1858, being authorized to certify to the existence of any patent, record or other document, his certificate that a record exists implies that the place where it is found is the place where by law it should be found.

The authority of the commissioner to certify is not confined to the original patent, record or other document. A copy, certified by him, is admissible in evidence.

Held, further, that the book in which the record of the will was made by the clerk, passed, by section 69 of the Judiciary Act of 1847, to the clerk of the Court of Appeals, who was authorized to furnish certified copies of all records transferred to him pursuant to that act; and this certificate being in due form, a copy of the will from the record was properly received in evidence: *Mackinnon v. Barnes*, 66 Barb., 91-2.

The books which a county treasurer is required by law to keep, and his accounts and official reports to the board of supervisors are admissible as against him and his sureties to prove what funds have come into his hands: *Supervisors, etc., v. Clarke*, 25 Hun, 282; *Cassady v. Trustees*, 105 Ills., 560.

The book which the county treasurer is required to keep, showing the payments made to him by the tax-collector

on account of county taxes (Code, § 845), is an official public document; and the entries therein, being made under the sanction of an official oath, are *prima facie* correct, and are competent evidence as against the tax-collector of the facts stated: *Dudley v. Chilton County*, 56 Ala. Rep., 594; *Middleton v. Mellon*, 10 Barn. & Cress., 317.

But see *Murray v. Gibson*, 28 Grant's Chy., 12.

The testimony of a witness as to a matter of fact is not affected by proof that he was a public officer, required by law to make a record of the facts in question; and that such record, as originally made by him, did not include a statement contained in his oral testimony. Hence, proof of the alteration of the record by subsequent insertion of such statement is inadmissible to contradict his oral testimony: *Vallory v. Perkins*, 9 Bosw., 572.

A copy of the plate of the arms of the Knights of the Garter, now existing in the Chapel Royal at Windsor, was received in evidence, the plate itself not being removable, except by authority of the Queen, and no such plate having been removed since first put up in the reign of Henry 5: *The Shrewsbury Peerage*, 7 House of Lords Cases, 1.

If the certificate of an officer is evidence in favor of third persons it is in favor of himself: 1 Greenl. Ev., § 352; *McKnight v. Lewis*, 5 Barb., 681; *McCully v. Malcolm*, 9 Humph. (Tenn.), 187.

The indorsement of a levy and return on an execution are evidence in favor of the officer making it: *Cornell v. Cook*, 7 Cow., 310; *Spoor v. Holland*, 8 Wend., 445; *Earl v. Camp*, 16 Wend., 562.

Though not filed: *Glover v. Whittenhall*, 2 Den., 683.

See *Millspaugh v. Mitchell*, 8 Barb., 885.

An officer may read an execution though he has not indorsed the time of its receipt: *Beals v. Gurnsey*, 8 Johns., 52.

Justices of the peace may use transcripts from their own dockets as evidence in suits against them: 2 Cow. Tr., 886; *Maynard v. Thompson*, 8 Wend., 893.

So of a notary public: *McKnight v. Lewis*, 5 Barb., 681.

The proper mode of proving papers on file, in any of the departments of public officers of the government, is by procuring certified copies from those persons who have them in custody.

The counsel for the government cannot be compelled to produce either such copies or the originals, for the benefit of parties who may be litigating with the government.

Notice, therefore, to the party or counsel representing the government to produce such papers, does not authorize the party giving the notice to use other copies than those properly certified as above stated: *Barney v. Scheneider*, 9 Wallace's U. S. Supreme Court Rep., 249.

A judgment which is not shown to have been entered in the records, may be proved by the entries on the docket of the court which entered it: *Central, etc., v. Lowell*, 15 Gray, 107.

Where the affidavit of the county treasurer does not show a proper post-

ing of notices of lands returned delinquent and of notice of sale, the fact that they were duly posted cannot be shown by parol at the trial of an action involving the validity of the tax title, as this would defeat the object of the statute in requiring such affidavit to be filed and preserved in the office of the clerk: *Iverslie v. Spaulding*, 32 Wisc., 394, 396-8; *Hilgers v. Quinney*, 51 id., 62.

But see *Mowry v. Sanborn*, 65 N. Y., 581, 68 id., 153, 72 id., 534.

It has been held that an exemplified copy by an officer is of greater weight than a sworn copy: 1 Greenl. Ev., § 503.

So that an affidavit by a defendant as to the time of the service of a declaration should govern in preference to a deputy sheriff's certificate; though if the deputy sheriff had made an *affidavit* of the time of service, it should control that of defendant: *Campbell v. Self*, 2 How. Pr., 85.

[5 Appeal Cases, 651.]

H.L. (E.), May 31; June 21, 1880.

[HOUSE OF LORDS.]

***PETER PITT and Others, Appellants; and THOMAS WEBB JONES and Others, Respondents** [651].

Partition—Sale or Valuation—31 & 32 Vict. c. 40, ss. 3, 5.

Owners of three-sixteenths of a property sought to have a sale of it; owners of thirteen-sixteenths of it objected to a sale and offered to purchase the shares of the others at a valuation. In the court of the Vice-Chancellor a valuation was ordered under the provisions of the 5th section of the 31 & 32 Vict. c. 40. The Court of Appeal decided that the case fell under the 3d section of that act, that the 5th section did not qualify or control the 3d, nor operate as a proviso upon it, and so the decision below was reversed, and a sale was directed:

Held, by LORD BLACKBURN and LORD WATSON (LORD HATHERLEY dissenting), that the decision of the Court of Appeal was correct, and must be affirmed.

A party asking for a sale is not compellable to part with his share on a valuation.

APPEAL against a decision of the Court of Appeal, which had reversed a previous decision of Vice-Chancellor Malins (*).

The appellants and respondents were interested in certain land and house property in Birmingham, and an action

(*) Reversing 8 Chy. Div., 548; affirming 11 Chy. Div., 78.

(*) *Nom. Gilbert v. Smith*, 8 Ch. D., 548; 25 Eng. R., 465; 11 Ch. D., 78;

27 Eng. R., 349. There had been a previous decision on a point of practice, 2 Ch. Div., 686.

was brought in January, 1876, by Gilbert (since deceased), and Jones, and certain others, to have a sale of the property under the direction of the court. The defendants were desirous of retaining their shares, and offered to purchase the plaintiffs' shares. The question raised between the parties depended on the construction that ought to be put upon the 3d and 5th sections of the 31 & 32 Vict. c. 40, the Partition Act, 1868. The shares appeared to be very numerous, but practically it was understood that the whole might be divided into sixteenths, of which the plaintiffs were entitled to three-sixteenths and the defendants to the remaining thirteen-sixteenths. Vice-Chancellor Malins had held that the case came within the 5th section of the act (although it 652] satisfied *the conditions of the 3d section), and upon some of the defendants undertaking to purchase, a valuation was directed to be made in chambers, and purchase and sale thereon. The plaintiffs who sought to have a sale by auction appealed, and the Court of Appeal decided that the 3d section was not controlled by the 5th section; that the number of parties interested, and the nature of the property, were such that the court was of opinion that a sale would be beneficial to all parties, and therefore reversed the decision of Vice-Chancellor Malins, and directed a sale with power to all parties, except those having the conduct of the sale, to bid.

This appeal was then brought.

Mr. *J. Pearson*, Q.C., and Mr. *Bardswell*, for the appellants: The parties having the least interest in the property here ask for a sale; the parties having the greatest interest in the property object to a compulsory sale, and offer to take the other shares at a valuation. That gets rid of any necessity for a sale. The case of *Pemberton v. Barnes* (*) is not adverse to the appellants, for there each party was entitled to a moiety, and Lord Hatherley thought that under such circumstances it was, under the 4th section, imperative on the court to order a sale. But all his Lordship's observations showed that, except for such a cause, the sale need not have been ordered, and that if the case had fallen within the 5th section it would not have been ordered, but that a valuation would have been directed. He thought that the 5th section qualified the directions of the 3d section, though it might not overrule the positive enactment of the 4th section where two parties, each claiming a moiety of the estate, were in contest. That case, therefore, is not opposed to the appellants. Nor does that of *Drinkwater v. Ratcliffe* (†)

(*) Law Rep., 6 Ch. Ap., 685.

(†) Law Rep., 20 Eq., 528.

affect this case, for there the party objecting to the sale, being a married woman, and her husband not joining with her, she could not give a valid undertaking to purchase at a valuation. A sale was therefore inevitable. Here the appellants are willing to give the undertaking, and are able to give it; and the 5th section, controlling the effect of the 3d section, authorizes the court in case of such undertaking being granted, to order a valuation of the share of the party *requesting the sale. The case of *Williams v. Games* (*) does not apply here, for the appellants do not ask for a partition, but, objecting to a sale by auction, they ask for a valuation and are ready to purchase, and under the 5th section they are entitled to that, for if the court has the power to order a sale unless the parties objecting to it are willing to purchase, it is clear that if they are willing, no such sale is to take place. Here they are willing.

Mr. *Bristowe*, Q.C., and Mr. *Lewin*, for the respondents: The property here is now only of a certain value. From the alterations which are going on in this part of Birmingham that value will be much increased if the property can now be sold. The court is therefore asked, on the ground that it will be for the benefit of all parties concerned, to direct a sale and not a valuation. The *onus* of proving that there ought not to be a sale lies on those who object to it. That *onus* is not discharged here. *Porter v. Lopes* (†) shows that in a case like the present, unless the court saw good reason to the contrary, a sale must take place. There is no “good reason to the contrary” here. The order for a valuation must be inoperative, for *Williams v. Games* (†) decides that the court has no power, under the 5th section of the act, to order that the part owner who asks for a sale shall sell to the others at a valuation. And in *Pemberton v. Barnes* (‡) it was held that the words of the 4th section rendered it imperative to order a sale, and that was the principle acted on in *Roughton v. Gibson* (‡), which also decided that the court was to exercise a discretion for the benefit of all the parties. The act was passed to remedy the inconveniences and almost inevitable injustice of partition, and it was felt that the best way to effect that purpose was to give the court a power to order a sale. In all instances the courts had taken the circumstances of the case into consideration, and the circumstances here pointed clearly to the advantage, for all parties, of a sale, and therefore best effectuated the purposes of the statute.

(†) Law Rep., 10 Ch. Ap., 204.

(‡) Law Rep., 6 Ch. Ap., 685.

(*) 7 Ch. D., 358; 23 Eng. Rep., 681.

(†) 46 L. J. (Ch.), 366.

Mr. *Glasse*, Q.C., Mr. *W. W. Cooper*, Mr. *Woodroffe*, and 654] Mr. **Davenport*, were for other parties interested, but did not address the House.

Mr. *Bardswell*, in reply.

LORD HATHERLEY: My Lords, the question in this case arises on the Partition Act, 1868. The appellants and respondents, or some of them, are entitled as tenants in common to property which all parties now desire to have divided or sold; but the question is whether the whole should be sold under the powers conferred by the act upon the court, or whether the respondents are entitled to buy out the interest of those who ask for a sale, and to retain the property as a whole. It is admitted that a sale would, in point of value, be more beneficial to all parties than a partition of the property, but the application for a sale has been made to the court under the act by those who are entitled to less than a moiety of the estate, while others are desirous of retaining their whole shares.

It will be well to notice the general scheme of the act, and the assistance which it proffered to persons entitled to interests held in common, towards disengaging their shares. Before this statute, tenants in common could, by filing a bill, claim partition as of right, but they could not, except by the consent of all, sell and dispose of the estate as a whole. If any of them were under disability, such consent could not be had. The first provision to be made, therefore, was to empower the court to sell. For this purpose it was necessary that the court should be able to bind parties under disability, and to overrule the dissentient parties, where it should seem desirable that the property should be sold as a whole. But this must obviously be done with a due regard to the common interests of all.

It appears to me that in construing the act we must consider its intention in giving all these powers, to be the guiding clue to its construction, and I think that the 3d, 4th, 5th and 6th sections of the act effectuate the above purposes, all of them having the common object of facilitating a sale. The 3d section states with what objects the power of sale is conferred, what shall be the power, and at whose request 655] it shall be conferred. In view *of the objects there mentioned, and on the application of any party interested, and notwithstanding the dissent or disability of others, the court may sell absolutely.

But it was foreseen that the concurrence of all the parties interested was not always to be expected, and, therefore, the 4th section provided for the case of one half or more of the

owners concurring in the application, and in that case enjoined a sale, without leaving any farther discretion to the court than the duty of seeing that there was no good reason why a sale should not be had. The 5th section, as it seems to me, enacts that the sale might be made by the court in all cases (in the same words, observe, as in sect. 3) unless the opposing parties should undertake to buy out at a valuation the interests of the party proposing a sale, in which case the section prescribes imperatively the mode of making the valuation. The 6th section farther provides for giving to any of the owners liberty to bid, subject to the regulation of the court.

The above construction gives effect to each of the above sections (3d, 4th, 5th, and 6th), and does not require as to any of the sections that any words should be added or struck out. I do not for a moment doubt that the act might have been made more clear, and the difference of opinion that has been shown in the few authorities cited, is sufficient to test this. I, after much consideration of one of the cases, *Pemberton v. Barnes* ('), took a different view from that taken by a learned Vice-Chancellor and by the Master of the Rolls, in other cases, as in the present. Other very learned judges have taken a different view from mine. I have carefully reconsidered what I then said, and I would now refer to it as my present opinion.

I think that a construction which authorizes a sale under the 3d section, and allows no effect to the provision for a sale being made conditional under the 5th section, is wrong. It is only a power given to sell, unless the undertaking is given. If I say, "You may sell my house for £1,000 to-morrow, unless more is offered to-day," and such higher offer should be made, the power of selling is fettered and arrested, as it is here, by the valuation. A contrary construction converts the conditional power of sale into an *absolute power, and renders the whole provision for [656 staying a sale by buying out the interest of the applicants for sale, into a nullity, nor does the reasoning of the Master of the Rolls in *Drinkwater v. Ratcliffe* (') reconcile me to the construction he has there elaborately enunciated. It is difficult to say when the 5th section can take effect, if it be not in a case like the present, or for what purpose a sale is to be arrested, and a valuation be first provided for, if a person holding one-fiftieth share could compel a sale under the 3d section, if the court allows it, whether the holders of the other forty-nine parts are willing to pay him out or not.

(') Law Rep., 6 Ch. Ap., 685.

(') Law Rep., 20 Eq., 528.

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I think, therefore, that the decree of Vice-Chancellor Malins, in the case before us was right, and ought not to have been reversed, but that it should be restored by the decree now to be made by your Lordships, and the decree complained of should be reversed with costs; but as I believe my noble and learned friends differ from me, I suppose the order must be an affirmation, and the appeal be dismissed with costs.

LORD BLACKBURN: My Lords, this case is now reduced to a short point, but one of considerable difficulty.

This was a suit for partition where, before the Partition Act, 1868, a decree for partition might have been made. It is now admitted that it appears that a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them; and parties interested, who hold less than a moiety of the property, have requested the court to direct a sale.

Some of the other parties interested offered to undertake to purchase the share of the party requesting a sale, and the Vice-Chancellor ordered a valuation of the share of the party requesting a sale.

That party objected to this, declaring that, if he might not have an open sale of the whole, he would withdraw his request for a sale, and leave the suit for a partition to proceed [657] exactly as if no such *request had been made. The Vice-Chancellor overruled this objection and made an order. On appeal the Court of Appeal sustained the objection, and made an order for a sale of the whole property.

If it was right to order the whole property to be turned into money by a sale, there are all proper provisions for allowing the parties to bid and make offers, and no complaint is made of the order in respect of those matters. The question raised by the appeal is, whether, under the circumstances stated, the Court of Appeal was right in ordering the sale of the whole. That depends on the construction of the 3d, 4th and 5th sections of the Partition Act, 1868, which are not so clearly expressed as to prevent a difference of opinion; and I am sorry to find that I differ in opinion from the noble and learned Lord now on the woolsack (Lord Hatherley).

There is authority upon the question. In *Pemberton v. Barnes* (¹), in 1871, Vice-Chancellor Malins put a construction on the 4th section of the act which, on appeal, was reversed by the Lord Chancellor (Lord Hatherley). The Lord

(¹) Law Rep., 6 Ch. Ap., 683.

Chancellor had to construe the 4th section, but in so doing he expressed an opinion as to the construction of the 5th section, which, though not the precise point before him, was by no means irrelevant to the construction of the 4th. He says ('): "If we then look to the 5th section we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3d and 4th sections. A wide discretion is given to the court. The court may think that a sale under the 3d or 4th section is rather hard upon the parties who are very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the court can give them liberty to do so." And I think that the opinion thus expressed by Lord Hath-erley, as Lord Chancellor, was one in favor of the present appeal.

The next case was *Williams v. Games* (*), in February, 1875. There, in a partition suit, it did not appear that the sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property *between them. But two holders of [658 one-seventh part, being less than a moiety, requested a sale. The proprietors of five-sevenths offered to undertake to purchase their two-sevenths at a valuation. The Master of the Rolls made an order that the two should convey their sevenths at a valuation; one of them appealed, contending that his request was for a sale of the whole, and that if he might not have that he withdrew his request, and that the section did not give power to the court to order him to part with his share at a valuation. The Court of Appeal, consisting of Lords Justices James and Mellish, set aside the order of the Master of the Rolls, and ordered a usual partition decree. The judgment of Lord Justice Mellish is very short, but I think it sufficiently appears that the construction he put upon the 5th section was one favorable to the respondents in this case.

Next comes *Drinkwater v. Ratcliffe* (*), in July, 1875. The facts there did not call for a decision on the construction of the 5th section; for the person offering an undertaking to purchase the share of the person requesting a sale, was not capable of entering into one. But the Master of the Rolls went very fully into the question of the construction of the whole act. And his reasoning in that case is adopted by the Court of Appeal, consisting of the Master of the Rolls, Lord Justice James, and Lord Justice Bramwell, as

(') Law Rep., 6 Ch. Ap., at p. 698.

(*) Law Rep., 10 Ch. Ap., 204.

(') Law Rep., 20 Eq., 528.

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the ground of the judgment now appealed against. No other authority was cited bearing on the subject, and I believe there is no other.

I do not think it can properly be said that the construction of the act was settled by authority, even in the Court of Appeal before this case was decided, and it is to me clear that it is not settled in your Lordships' House; but the balance of authority is in favor of the respondents. And though, if I thought that the Master of the Rolls and Lords Justices James, Mellish, and Bramwell, were all mistaken, I should feel bound to say so, I should do so with much diffidence, though fortified by the opinions of Lord Hatherley, as Lord Chancellor, and Vice-Chancellor Malins. But treating all that has been said in the courts below as arguments to be weighed, not as authorities to bind, I put the same construction on the act as that put on it by the court [659] below. My reasons *are nearly the same as those given in *Drinkwater v. Ratcliffe* ('); but I will state them in my own words.

Each one of the three sections begins with the same phrase, "In a suit for partition where if this act had not been passed a decree for partition might have been made then—" They are, in form at least, independent enactments, though, no doubt, all to be construed together. The 4th and 5th sections are not, either of them, in form at least, nor, as I think, in substance, provisos on the 3d, though it comes first in order. Indeed I think the intention would have been more obvious if the order in which the enactments have been placed had been reversed, and the 5th section placed as 3d, and the 3d as 5th. Sect. 5 says, that in every case of a suit for partition (whether the sale would or would not be more beneficial for the parties than a partition), if any party (whether owning more or less than a moiety) requests a sale, the court shall have a discretion to order a sale, unless the parties opposing a sale are willing to take his share at a valuation. But it does not say, nor do I think it was intended to say, that a party who requests a sale of the whole must take that valuation; I think it means that if a party presses for a sale, and the court thinks that the opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his share at a valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so; but will then have his common

(') *Law Rep.*, 30 Eq., 528.

law right to a partition. This is what was decided in *Williams v. Games* (*) and is what I understand to be the opinion of Lord Justice Mellish in that case.

But, I think, the party declining to accept this undertaking for a valuation is not hereby prevented from pressing for a sale under the other sections of the act if he can bring himself within them. The court cannot, under sect. 5, order a sale merely on the request of a party if the opposing party is willing to buy him out. It may make such an order under the 3d section if the case is brought within it. It must, under sect. 4, unless it sees good reason to the contrary, do so where the party requesting a sale is owner of a moiety or more. This was the construction put upon *sect. 4 [660 in *Pemberton v. Barnes* ('). I see that in this case Vice-Chancellor Malins says he still thinks the view he took of the construction of that section preferable to that put upon it by the Lord Chancellor. I cannot agree with him; but the Lord Chancellor (Lord Hatherley) did express an opinion that the 5th section was applicable to proceedings under the 3d and 4th sections, and was intended to give the court a discretionary power to prevent a sale under these sections if the opposing party was willing to bind himself to take the applicant's share at a valuation; and this is contrary to the opinion I have just expressed. I think if this had been intended it would have been properly expressed in the form of a proviso on the 3d and 4th sections, and not by a fresh substantive enactment; and it would have been properly expressed by saying that the court *shall not* direct a sale *if* the other parties undertake, &c., and not by saying that the court *may* direct a sale, *unless*, &c. But I cannot think it was intended; a sale by valuation is a very different thing from an open sale, and I do not see why a party should be forced to sell his property at a valuation; and I think the words used here give him an option to accept such a valuation, if offered to him, but do not compel him to do so.

I therefore come to the conclusion that the order appealed against is right, and should be affirmed, and I move that the decree appealed against be affirmed, and the appeal dismissed with costs.

LORD WATSON: My Lords, this appeal is taken in a suit for the partition of certain heritable estate in Birmingham. The appellants' interest in the property extends to thirteen-sixteenths, the remaining three-sixteenths being vested in the parties now appearing as respondents.

(*) Law Rep., 10 Ch. Ap., 204.

(') Law Rep., 6 Ch. Ap., 685.

The respondents desire and assert their right to have a sale of the property and distribution of the proceeds amongst the parties interested, in terms of sect. 3 of the Partition Act, 1868; and in the event of their failing to obtain that remedy, they insist upon their common law right to have the property divided.

661] *The appellants hardly dispute that the circumstances of the case are such as fairly to bring it within the provisions of sect. 3; and I understood them to concede in argument that had that clause been the sole enactment of the statute, it would have been proper for the court to direct a sale. They contend, however, that, under sect. 5, the court possesses the power—which it ought to exercise—of directing that there shall be no sale, in respect of their willingness to give an undertaking to purchase the respondents' shares at a valuation.

The whole contention of the appellants hangs upon the proposition that sect. 5 gives the court a discretionary power, in cases falling within the scope of sect. 3, to refuse decree of sale, and in lieu thereof to order the party desiring sale, to sell his share at a valuation, to one or more of the other parties interested, provided he or they give an undertaking to purchase. It therefore becomes necessary to consider how far that proposition is well founded.

Before the passing of the Partition Act the respondents would have had an absolute right to a decree of partition; and it appears to me that the leading purpose of the act, as disclosed in sects. 3, 4 and 5, was to enable the court to substitute, in certain cases, sale and distribution for division, which was the only remedy previously competent. The new remedy thus given is, in reality, another form of partition, those interested taking their individual shares in money instead of in specie. Sect. 3 confers upon the court power to direct a sale whenever it is satisfied that sale will be more beneficial for the parties interested than division. Sect. 4 is an imperative enactment to the effect that if parties interested to the extent of one moiety or upwards request a sale, the court shall order a sale, "unless it sees good reason to the contrary." This section will obviously apply to a large class of cases in which the court is not satisfied that the preponderance of benefit is in favor of a sale, and which cannot, therefore, be brought within the provisions of sect. 3.

Thus far the construction of the act is not attended with much difficulty, but the language of the 5th section is suffi-

ciently ambiguous to have occasioned a difference of judicial opinion in regard to its real import. The point raised in this appeal has not, in my opinion, been previously decided; but it has been discussed and *made the subject of [662 judicial comment in several cases arising under the Partition Act.

The view taken by the noble Lord now on the woolsack (Lord Hatherley), when deciding, as Lord Chancellor, the case of *Pemberton v. Barnes* ⁽¹⁾ was, as I read the judgment, to the effect that sect. 5 is in substance a proviso on sects. 3 and 4, and that it confers upon the court a discretionary power, when it thinks that a sale under either of these two sections would be hard upon parties who are anxious to avoid a sale, to give them liberty to buy the shares of the parties requesting a sale.

A contrary opinion was expressed by the Lords Justices James and Mellish in the subsequent case of *Williams v. Games* ⁽²⁾, and by the Master of the Rolls (Sir George Jessel) in the still later case of *Drinkwater v. Ratcliffe* ⁽³⁾. These learned judges adopt the view that sect. 5 is an independent clause giving an entirely new power to any party who is prepared to sell his own interest, to insist for and obtain a decree of sale unless some one is willing to buy his share, but not giving power to the court to compel any party interested to sell his share at a valuation.

In the present case the Vice-Chancellor (Malins), following the authority of the noble Lord now on the woolsack (Lord Hatherley), decided in favor of the appellants' contention. But in the Court of Appeal, the Master of the Rolls, with the concurrence of Lords Justices James and Bramwell, adhered to the views which he expressed in *Drinkwater v. Ratcliffe* ⁽³⁾, and accordingly the court made an order for the sale of the property, with leave to any of the parties interested, not having the conduct of the sale, to bid and become purchasers as provided for in sect. 6 of the act.

The question raised in this appeal has all along appeared to me to be one of great nicety; but having now fully considered it, I have come to the conclusion that the construction of sect. 5 indicated in the cases of *Williams v. Games* ⁽²⁾ and *Drinkwater v. Ratcliffe* ⁽³⁾ is the correct one. In forming that opinion I have been mainly influenced by these considerations:—first, sect. 5 is, in form, not a proviso, but an independent enactment, and must be so construed, unless

⁽¹⁾ Law Rep., 6 Ch. Ap., 685.

⁽²⁾ Law Rep., 10 Ch. Ap., 204.

⁽³⁾ Law Rep., 20 Eq., 528.

663] its terms plainly indicate that the contrary *was intended by the Legislature; secondly, without doing any violence to its language the clause may be read as a new and substantive enactment, empowering any party who has made up his mind to sell his own share at a valuation, to insist for and obtain a decree of sale, unless some of the other parties give an undertaking to purchase his interest; thirdly, that construction not only brings the substance of the clause into accord with its form, but it is entirely consistent with the main purpose of the act, which, as I understand it, was to introduce a new method of partition by providing for the sale of joint property and distribution of the proceeds; and fourthly, the opposite construction necessarily implies, in my opinion, that in all cases where parties whose interest is less than a moiety come into court requesting a sale, the court has power, not only to refuse the remedy which they ask, but to force upon them another and a different remedy, which is in no sense partition. It appears to me that if such power were held to be conferred upon the court by sect. 5 it might in some cases impede the operation of the statute; because parties having less interest than a moiety would scarcely venture to request a sale in cases clearly falling under sect. 3, seeing they would thereby incur the risk of being compelled to part with their shares in a form not according to their will.

From that construction of the clause which I adopt, it necessarily follows, in my opinion, that the provisions of sect. 5 cannot be enforced, except at the instance of a party requesting a sale, and voluntarily offering, as an alternative, to sell his own share to the other parties interested, at a price to be fixed by the court, and also that he may retract that alternative at any time before a judicial contract has been completed by these parties, or any of them, giving the requisite statutory undertaking to purchase. The result of retraction will be to deprive him of the right to insist for a sale under sect. 5, leaving him to seek his remedy, either by proceedings under sect. 3 or 4, if he can bring his case within them, or by decree of partition.

In the present case the appellants neither request a sale, nor do they offer to sell their shares. On the other hand, the respondents have never offered or consented to sell the shares belonging to them, and in these circumstances I think 664] the provisions of *sect. 5 have no application, and that, the case being clearly within the provisions of sect. 3, they are entitled to have a decree of sale.

I am accordingly of opinion that the judgment of the Court of Appeal ought to be affirmed.

Decree complained of affirmed; and appeal dismissed with costs.

Lords' Journals, 21st June, 1880.

Solicitors for appellants: *Letts Brothers.*

Solicitors for respondents: *Spencer Whitehead; Gamlin & Son; Robinson, Preston & Stow.*

[5 Appeal Cases, 664.]

H.L. (E.), June 21, 24, 25, 1880.

[HOUSE OF LORDS.]

THE DIRECTORS, &c., of the CITY BANK, *Appellants*; and SAMUEL BARROW and REUBEN BARROW, *Respondents*.

Factors Act—Canada Code—Agent—Hypothecation of Property of Real Owner.

Where there is a power, by law, to sell, a purchaser may obtain, from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge.

Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1½d. per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight, and send back the hides. Barrow sent out a large number of the hides; they were tanned, and freight was procured for them, but in the meantime Bonnell had obtained from the Toronto Bank bank advances, on his own account, on bills, and hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of lading if his bills of exchange were not duly honored. They were not duly honored, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied:

Held, that, under the circumstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow entitled to pledge Barrow's goods, and that consequently, the bankers could not set up any title to the goods, as derived from him, against the real owners.

APPEAL against a decision of the Court of Appeal which had reversed a judgment of the Common Pleas Division, in a cause *wherein Messrs. Barrow were the plaintiffs, [665 and the directors of the City Bank were defendants.

The respondents, Messrs. Barrow, carried on the business of leather merchants at Bermondsey. The appellants were the London agents of the Bank of Toronto, in the dominion of Canada. At the time of the transactions out of which the present appeal arose, Walter Bonnell carried on the business of a tanner in the province of Quebec. He was also a dealer in leather at Montreal; he had besides an office in London, and traded under the name of Walter Bon-

nell & Co. There was a mode of tanning leather in Canada which was supposed to be less expensive and better than that practiced in England, and by letters which passed between the parties, it was agreed that in consideration of Messrs. Barrow paying 1½*d.* English currency for every pound of tanned sole-leather, Bonnell should tan all hides, sent from them to him, at the tannery station near Montreal, not exceeding in number 250 a week, and should also exercise his best ability in obtaining for Messrs. Barrow freight for the leather from the same station to England. In the course of 1875 the plaintiffs sent to Bonnell 1816 hides, weighing 38,359 lbs. They were not sent back as expected, and a correspondence ensued on the subject. It was then discovered that Bonnell had transferred the bills of lading of the hides to the Toronto Bank, to which he had pledged them to cover advances on his own bills of exchange. The shipping and other documents were in the hands of the present appellants as agents for the Toronto Bank. The charge for tanning these hides was alleged to be £559 7*s.* 11*d.*, payment of which was duly tendered with an offer made (through Barrows' solicitor) to pay such farther amount in respect of freight and other charges as might be due. The offer was refused, and an action was then brought by the plaintiffs (now respondents) to recover the documents under which possession was held and also the hides themselves. The defence was that Bonnell carried on at Montreal the business of a factor, warehouseman, and consignment agent as well as that of a leather tanner, and that in the former character he had pledged the goods in question.

The case came on for trial before Mr. Justice Lindley (without a jury) in December, 1878, and was heard on far-666] ther consideration *in May, 1879. Samuel Barrow deposed that Bonnell had never had in his possession any goods of the plaintiffs for any other purpose than that of being tanned, and then returned, in accordance with the agreement already stated. The effort on the other side was to show that Bonnell had sold hides to or for the plaintiffs, and that he was to be regarded in the light of a factor or agent. A commission to take evidence in Canada had been issued, and six professional witnesses were examined as to the law of Canada, three of whom, Mr. Badgeley, Mr. Day, and Mr. Barnard, gave evidence for the plaintiffs, and Mr. Laflamme, Mr. Ritchie, and Mr. Kerr for the defendants. Mr. Justice Lindley held that Bonnell was not an agent for consignment within the meaning of the English Factors Act, nor within the meaning of the corresponding articles of the

Civil Code of Lower Canada, but that the defendants were according to Canadian law entitled to the goods and proceeds as pledged to them for valuable consideration by the apparent owner of the goods. On appeal this decision was reversed. This appeal was then brought.

Mr. *Cohen*, Q.C., and Mr. *Roland Vaughan Williams*, for the appellants: They contended that under certain articles in the Canadian Code, 1487 (*), 1489 (*), 2268 (*), and under the provisions of certain Colonial Acts which had followed in a great measure the provisions of the English Factors Acts, the appellants were entitled to retain these securities until their claims in respect of the bills of exchange *were satisfied. This was clearly a commercial matter, which brought the case within the words of one of the articles of the Code, and Bonnell was within another of the articles of the Code a trader dealing in similar articles, and the Code showed that the spirit of Canadian law protected transactions of this kind, since possession under such circumstances was, after three years, not merely in a case like the present, where every act of the appellants had been of an honorable commercial character, but "even when the loss of possession has been occasioned by theft," made complete by prescription. Bonnell exactly filled the character of a "*facteur*" under the Canadian law, or a factor or agent under the English law, he was a dealer in leather, he was, within the words of the Canadian Act, an "agent intrusted" with these hides, he was allowed to have the actual possession of them; he was expressly authorized to ship them on freight. He was in all respects a mandatory, and the 1701st article of the Code described mandate as a contract by which a person called the mandator commits a lawful business to the management of another. That was precisely what had been done here. To all the world he appeared, therefore, as the person having authority to dispose of these hides at his pleasure. Now, as it was not pre-

(*) "The sale of a thing which does not belong to the seller is null, subject to the following exceptions. . . . 1488. The sale is valid if it be a commercial matter."

(†) "If a thing lost or stolen, be bought in good faith, in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing the purchaser the price he has paid for it."

(‡) "Actual possession of a corporeal movable, by a person as proprietor,

creates a presumption of lawful title. Prescription of corporeal movables takes place after the lapse of three years (reckoning from the loss of possession), in favor of possessors in good faith (even when the loss of possession has been occasioned by theft). This prescription is not, however, necessary to prevent reclaimer, if the thing has been bought in good faith, in a fair or market, or at a public sale, or from a trader dealing in similar articles (nor in commercial matters generally)."

tended on the other side that the bankers had the smallest reason to suspect that he had not the absolute control and dominion of this property, they were entirely justified in accepting the transfer of it from him to cover the advances which they had in perfect good faith made to him.

Paterson v. Tash ⁽¹⁾; Bell's Commentaries ⁽²⁾; *Cole v. The North Western Bank* ⁽³⁾; *Hatfield v. Phillips* ⁽⁴⁾; *Trop-Long* ⁽⁵⁾; *Moyce v. Newington* ⁽⁶⁾; *Cassils v. Crawford* ⁽⁷⁾; *Johnson v. Crédit Lyonnais Company and Johnson v. Blumenthal* ⁽⁸⁾; and *Heyman v. Flewker* ⁽⁹⁾ were cited and commented on.

The Solicitor General (Sir F. Herschell), and Mr. J. Horne 668] *Payne*, *were for the respondents, but were not called on to address the House.

THE LORD CHANCELLOR (Lord Selborne): My Lords, this case has been argued very carefully and very elaborately and with much ability both by Mr. Cohen and by Mr. Vaughan Williams; and the fullness with which they have argued it has enabled your Lordships to consider it during the progress of the argument, and I believe the result is that none of your Lordships entertains any doubt that the judgment appealed from is right.

My Lords, I find that all the judges, Mr. Justice Lindley, and the judges of the Court of Appeal, were agreed as to the effect of the clauses which have been called "factors' clauses" in the Canadian Code, to which we have been so frequently referred. I entirely concur in their view of those clauses; and it appears to me that the case really depends upon those clauses, and upon nothing else. I will, however, reserve what I have to say upon those clauses for the present, because the judgment of Mr. Justice Lindley proceeded upon a different ground, and that other ground has been perhaps more than anything else the foundation of the argument, at least of Mr. Vaughan Williams, at your Lordships' bar.

If I rightly understand it, Mr. Justice Lindley thought that there was difficulty, upon the evidence as to the Canadian law (as to which there were three learned witnesses upon one side, and three learned witnesses upon the other), in coming to a satisfactory conclusion; treating that foreign,

⁽¹⁾ 2 Str., 1178.

⁽²⁾ Part 3, s. 3.

⁽³⁾ Law Rep., 10 C. P., 354; 5 Eng. Rep., 719.

⁽⁴⁾ 12 Cl. & F., 343.

⁽⁵⁾ *Contrat de Vente*, 289.

⁽⁶⁾ 4 Q. B. D., 32; 28 Eng. R., 674.

⁽⁷⁾ In the Q. B., at Montreal, March, 1876.

⁽⁸⁾ 2 C. P. D., 224; 20 Eng. Rep., 486; 3 C. P. D., 32; 30 Eng. Rep., 19.

⁽⁹⁾ 13 C. B. (N.S.), 519; 32 L. J. (C.P.), 132.

or rather colonial law, as matter of fact, to be proved by evidence. That being so, he thought the balance was turned by the reference found in the evidence to the case of *Cassils v. Crawford* (¹), decided by the Court of Queen's Bench in Canada; in which (although the point which arises in this case was not really the ground of the decision) *dicta* of the judges were found tending, if correct, to establish this proposition, that under other articles of the Canadian Code (not being those contained in the factors' clauses), *there [669 was a power for a person having possession of goods, in the circumstances in which Mr. Bonnell had possession of the leather in this case, to pledge such goods, in a commercial transaction, to a body such as the appellant bank.

My Lords, I must own that upon looking at that decision, or rather at those opinions, given by the learned judges in the case of *Cassils v. Crawford* (¹), I cannot discover in them, or in the articles of the Canadian Code to which they refer, any sufficient ground for the conclusion arrived at by Mr. Justice Lindley. They seem to me to have been opinions, unnecessary for the purpose of the judgment then delivered, not supported by any sound reason or satisfactory authority, and not justified by the articles of the Code to which reference was made. The particular case was this: The clerk of a merchant had stolen some of his master's goods, and had pledged them to a person who was in that case the plaintiff. In some way they got out of his possession, and he brought an action for them; and by three to one the court determined that the thief did not, under any of the articles of the Canadian Code, give a good title to the pledgee. But in the course of those judgments, two of the learned judges (Mr. Justice Tessier and Chief Justice Dorian) expressed opinions to the effect, that under certain very general words in Article 2268 of the Canadian Code a person taking a pledge, from some one dealing commercially with another man's goods without his authority, and without being in any sense his agent, might obtain a good title as pledgee. The other two judges laid down broadly the principle, that whatever was true of sale under the articles of the Code relative to that subject, ought to be extended also to pledge; that pledge was implied in sale; that the reason in the one case was the same as in the other.

It appears to me, my Lords, that the general doctrine to which I have last referred, and which seems to be independent of anything in the terms of Article 2268 or any other express article of the Code, is altogether untenable. If

(¹) In the Q. B. at Montreal, March, 1876.

The respondents desire and assert their right to have a sale of the property and distribution of the proceeds amongst the parties interested, in terms of sect. 3 of the Partition Act, 1868; and in the event of their failing to obtain that remedy, they insist upon their common law right to have the property divided.

661] *The appellants hardly dispute that the circumstances of the case are such as fairly to bring it within the provisions of sect. 3; and I understood them to concede in argument that had that clause been the sole enactment of the statute, it would have been proper for the court to direct a sale. They contend, however, that, under sect. 5, the court possesses the power—which it ought to exercise—of directing that there shall be no sale, in respect of their willingness to give an undertaking to purchase the respondents' shares at a valuation.

The whole contention of the appellants hangs upon the proposition that sect. 5 gives the court a discretionary power, in cases falling within the scope of sect. 3, to refuse decree of sale, and in lieu thereof to order the party desiring sale, to sell his share at a valuation, to one or more of the other parties interested, provided he or they give an undertaking to purchase. It therefore becomes necessary to consider how far that proposition is well founded.

Before the passing of the Partition Act the respondents would have had an absolute right to a decree of partition; and it appears to me that the leading purpose of the act, as disclosed in sects. 3, 4 and 5, was to enable the court to substitute, in certain cases, sale and distribution for division, which was the only remedy previously competent. The new remedy thus given is, in reality, another form of partition, those interested taking their individual shares in money instead of in specie. Sect. 3 confers upon the court power to direct a sale whenever it is satisfied that sale will be more beneficial for the parties interested than division. Sect. 4 is an imperative enactment to the effect that if parties interested to the extent of one moiety or upwards request a sale, the court shall order a sale, "unless it sees good reason to the contrary." This section will obviously apply to a large class of cases in which the court is not satisfied that the preponderance of benefit is in favor of a sale, and which cannot, therefore, be brought within the provisions of sect. 3.

Thus far the construction of the act is not attended with much difficulty, but the language of the 5th section is suffi-

ciently ambiguous to have occasioned a difference of judicial opinion in regard to its real import. The point raised in this appeal has not, in my opinion, been previously decided; but it has been discussed and *made the subject of [662 judicial comment in several cases arising under the Partition Act.

The view taken by the noble Lord now on the woolsack (Lord Hatherley), when deciding, as Lord Chancellor, the case of *Pemberton v. Barnes* (*) was, as I read the judgment, to the effect that sect. 5 is in substance a proviso on sects. 3 and 4, and that it confers upon the court a discretionary power, when it thinks that a sale under either of these two sections would be hard upon parties who are anxious to avoid a sale, to give them liberty to buy the shares of the parties requesting a sale.

A contrary opinion was expressed by the Lords Justices James and Mellish in the subsequent case of *Williams v. Games* (*), and by the Master of the Rolls (Sir George Jessel) in the still later case of *Drinkwater v. Ratcliffe* (*). These learned judges adopt the view that sect. 5 is an independent clause giving an entirely new power to any party who is prepared to sell his own interest, to insist for and obtain a decree of sale unless some one is willing to buy his share, but not giving power to the court to compel any party interested to sell his share at a valuation.

In the present case the Vice-Chancellor (Malins), following the authority of the noble Lord now on the woolsack (Lord Hatherley), decided in favor of the appellants' contention. But in the Court of Appeal, the Master of the Rolls, with the concurrence of Lords Justices James and Bramwell, adhered to the views which he expressed in *Drinkwater v. Ratcliffe* (*), and accordingly the court made an order for the sale of the property, with leave to any of the parties interested, not having the conduct of the sale, to bid and become purchasers as provided for in sect. 6 of the act.

The question raised in this appeal has all along appeared to me to be one of great nicety; but having now fully considered it, I have come to the conclusion that the construction of sect. 5 indicated in the cases of *Williams v. Games* (*) and *Drinkwater v. Ratcliffe* (*) is the correct one. In forming that opinion I have been mainly influenced by these considerations:—first, sect. 5 is, in form, not a proviso, but an independent enactment, and must be so construed, unless

(*) Law Rep., 6 Ch. Ap., 685.

(*) Law Rep., 10 Ch. Ap., 204.

(*) Law Rep., 20 Eq., 528.

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found. It is all about sale. "The sale is valid if it be a commercial matter." That has no reference at all to pledging, and none of these things is referred to under the title "pledge," which, as I have said, is a separate title.

In connection with this I take the other article, on which the chief stress seems to have been laid in this portion of the argument: Article 2268, under the head of "Prescription." That article provides that prescription shall take place, after three years corporeal possession as proprietor; and then it excepts from the necessity of proving prescription, cases in which the law gives a title without it. That is the whole effect of the words upon which so much stress has been laid. "This prescription is not, however, necessary to prevent a thing from being reclaimed by the original owner, if it has been bought in good faith in a fair, or market, or at a public sale, or from a trader dealing in similar articles" (which your Lordships will observe are the words of Article 1489). Then it goes on in words which appear to be new, and which (though I do not think that very material) were not part of the original draft of the Code; "nor in commercial matters generally," saving an exception contained in the next paragraph.

These words, "nor in commercial matters generally," appear to me, my Lords, to have been added in order to mention in this place the subject of Article 1488 in connection with the subject of Article 1489: whatever Article 1488 may mean, that, also, my Lords, I apprehend these interjected words mean; that, and nothing else. And whatever else is clear about Article 1488, this at all events is so, that it relates only to a sale, and does not relate to a pledge.

I do not think that, under these circumstances, it is necessary to endeavor to determine what the apparently wide words, "if it be a commercial matter," may or may not comprehend. My impression is, that those words do not mean to sweep in all sales, in all kinds of commercial dealings, without limit, which probably would have made it unnecessary to provide for many things which are specially provided for elsewhere in the Code—but that they only mean such sales as, either in the ordinary course of commercial 673] *business, according to the law-merchant, or under any special provisions of the Code as to commercial transactions (such as the factors' clauses), would give a good title, as against the true owner, to a *bona fide* purchaser.

For these reasons it appears to me that the arguments, which are independent of the factors' clauses, wholly fail. I may add that the argument founded upon the article

about prescription, labors under this additional infirmity, that it transforms into a positive enactment of the most wide, vague, sweeping, and general character, that which is no enactment at all, but merely a statement that prescription is not to be necessary in certain classes of cases in which there may be a title without it. But under what circumstances there shall be a title without it, that article manifestly does not determine. You must go elsewhere to answer that question.

I have said so much with regard to these matters because I think, that when they are disposed of, the whole case is disposed of. It was so, not only in the opinion of the learned judges in the Court of Appeal, but in the opinion of Mr. Justice Lindley also. When the question is reduced to one upon what have been called the factors' clauses, it is manifest that their operation under the Canadian Code, in such a case as this, is the same as the operation of the Factors' Acts in England in a similar case. They are taken almost entirely from the English Factors' Acts. If you look at the French translation you will find that the word "*facteur*," which is used throughout where you have "agent" in the English, is expressly defined to be "an agent for buying and selling." Independently of that, it seems to me that the general scheme of these articles would lead to the same conclusion. One thing is quite clear, and that is, that an "agent intrusted" means, not somebody else's agent, but the agent of the particular principal intrusted by him as such agent. In this particular case there was no such agent intrusted. It is not alleged that there was an "agent intrusted" with regard to the principal business, out of which the whole transaction arose, namely, the tanning of the leather. That comes under quite a different head—the head of "Lease and Hire" which precedes this head of "Mandate" in the Canadian Code.

*It is admitted that, as long as the tanning operation was going on, there was no agency at all within the meaning of these factors' clauses. But it is contended, that because the tanner, who had a lien on the goods for his labor, also undertook to procure freights and send the leather home, which he did, taking for his own security bills of lading made out in his name, which he sent to his agents in Liverpool, this made him, in that stage of the transaction, after the tanning was done, and when he was sending the goods home under his contract to the owner in England, an agent within the meaning of these factors' clauses. My Lords, it appears to me that such a view of the word "agent" would

be directly at variance with the authorities, which, as far as I can see, are for this purpose quite as applicable upon the construction of the words in the Canadian Code as upon the construction of the corresponding words in the English acts. The authorities are thus summed up by Mr. Justice Willes in the case of *Heyman v. Flewker* (¹). He says, after referring to certain cases, "All that these cases decide applicable to the present purpose may be stated thus: that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name."

I apprehend that, although perhaps the words, "possession for carriage, safe custody, or otherwise, as an independent contracting party," may not exactly describe the position of one, who, having been employed to do work upon goods, has also undertaken to find freights and send them home to the owner when the work is done; yet, in substance, the principle expressed in those words does apply to such an employment; and that a person who undertakes an agency of that kind is no more brought within the act than any of the persons whom Mr. Justice Willes mentions. He is not a person "whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the act has taken its name."

But perhaps, my Lords, it is unnecessary to refer to any 675] *authorities for that principle, when we find that in this Canadian Code the French translation uses throughout the word "*facteur*" where that word "agent" is used in the English, and expressly defines the word "*facteur*" in a manner which corresponds with Mr. Justice Willes' words.

I do not propose to dwell longer upon the case. The Bankers Act seems to me to carry it no farther. It is true it refers to the Consolidated Statutes and not to the Code; but the Code is, on this point, only a repetition of the Consolidated Statutes, and is a legislative declaration of the true meaning of those former statutes which are incorporated in it. On the whole, the conclusion which I arrive at is, that the judgment under appeal is right. I therefore move your Lordships that it be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY: My Lords, I am of the same opinion. I have listened with great interest to the argument

which has been offered to us on the part of both the learned counsel who appeared in support of this appeal. It was a very elaborate and carefully considered argument, and it brought forward, I apprehend, every point which could be of any value in bringing the House to a conclusion in favor of the appellants. But the difficulties of the appellants' case were insuperable. The argument could not succeed unless an extension could be given to the Code before us, which would have brought in a remedy in respect of this particular matter as regarded dealings with a factor, which remedy is not to be found in the provisions of the Code, because, as has been well observed by my noble and learned friend who preceded me, there is apparently a distinction carefully kept up in the Code between the case of sale, and the case of pledging, all through, on the one hand; and on the other hand as regards the remedies which are extended apparently by this act, in conformity with the legislation which took place in this country, and which may have been adopted to a certain extent by Canada from the mother country; that remedy does not appear to have been given (at least, not to the full extent) which has been given by some of the English acts. The construction of the clauses which have been referred to is for the *most part [676 plain and clear, namely, Articles 1488 and 1489 and 2268. The last of those articles refers, in one sense, to those former articles, pointing out the particular cases and referring again to those particular cases which have been dealt with by those previous clauses. Sale and pledge are carefully separated; a sale is confirmed in certain events by those clauses, but nothing is said about a pledge.

A great deal of argument was brought to bear upon those clauses, with respect particularly to one doubtful clause, which, in the view I take of the case, does not seem after all to be that which really determines the whole matter, namely, a clause containing words to this effect: the transaction when assailed is protected in matters of commerce, or if the person from whom the purchase is made is a trader dealing in similar articles to the one in question. One easily sees the care and precaution which have been used in framing the Code in that particular, because one of the strong *indicia* of fraud on the part of one person dealing with another, would be that the seller was not a person who, in the ordinary and natural course of his business, sold the article with respect to which the question arose, and as to which it would be impossible for a person coming to purchase from him, to make inquiry, without imposing on the purchaser

more trouble than he was bound to take, for the purpose of distinguishing between the articles he was selling on his own account, and those which were intrusted to him. Therefore, in commercial matters, an exception is made in this case. They must be such commercial matters as would take place between a person so situated on the one hand as a purchaser, and a person so situated on the other hand as a seller. It provides for transactions where the seller had goods which were partly his own and partly belonging to other people, which he was minded dishonestly to dispose of, and when the purchaser would approach him as an undistinguishing buyer of goods as to which he would have no reason to suppose that the ownership was different in the one case from what it was in the other.

Now, my Lords, if one could have seen anything in any one part of this voluminous Code which has been produced before us, which dealt in the same manner with a case of pledge, of course that would have been the one import-677] ant point to discover in the *whole Code; but, from first to last, after the case had been opened so that one was able to obtain a conception of what the precise point of it was, the great difficulty of it appeared to me to be to deal with this in any way as cases of sale are dealt with, when the Code from beginning to end seems carefully to separate these two things and to deal with them in a different fashion. That, my Lords, is really the short point to which the whole case is reduced. In trying to overcome the difficulties which present themselves, Mr. Vaughan Williams has been compelled to proceed into an analysis, but in the total result there has not been found any clause, as it appears to me, in which protection is thrown around a pledge obtained under the circumstances under which this pledge was given in the transaction we have before us. I concur in the judgment now proposed.

LORD BLACKBURN: My Lords, I am of the same opinion.

If this had been an English case, I mean a case to be governed entirely by English law, I should have thought it necessary to say no more than that it is decided by the case of *Cole v. The North Western Bank* (1), which I have not the slightest reason to suppose to be impeachable in any way whatever. But in point of fact it is not to be decided according to English law, because the pledge upon which the defendants claim was made in Canada in respect of goods then in Canada. I take it therefore that there is no

(1) Law Rep., 9 C. P., 470; 10 Eng. R., 249; 10 C. P., 354; 12 Eng. R., 418.

doubt that the validity of the pledge depends upon the Canadian law, and we have to see what the Canadian law is.

First of all, my Lords, I may observe that I quite assent to what has been said, and for which the passage in Bell's Principles (') was cited, that the rule not merely of English common law, but I take it of Roman civil law, and I apprehend of all the old laws of Europe, by which I mean the laws existing before the Code Napoleon, that no man could confer a greater title than he himself had, has been found in modern practice to be inconvenient to its full extent in commercial transactions, especially since *the prac- [678 tice of advancing money upon the security of goods and merchandise came to be so important as it is; and I quite agree that there have therefore been modifications of that principle introduced into the law of this country and into the law of Canada, and I dare say into the laws of other countries.

Those modifications were introduced in England and in Scotland too by the Factors Acts, which define and regulate, and show to what extent the modifications are given; they at once modify the law and show how far it is to be modified. It is sufficient to say, briefly, that the decision in *Cole v. The North Western Bank* (') comes to this: that an agent who can pledge or sell must be an agent of that class which, like factors (taking almost the words of Mr. Justice Willes in the case which has already been referred to of *Heyman v. Flewker* (')) have a business, which, when carried to its legitimate result, would probably end in selling or in receiving payment for goods. That would be a kind of class; factors and agents, in the class of factors. If such a person is "intrusted" and is intrusted in that capacity, then, in the absence of bad faith on the part of the pledgee, the pledge is good. If it is not, you must fall back on some other principle to make it good in law.

Now, how is it in Canada? In the first place, before I go farther, I will observe that there is not in all the mass of evidence which has been put together here, a suggestion that the old law of France contained any such provision as that all sales in matters of commerce were to be good whether the man had authority to make them or not. It did contain this provision, that the rule which says that you could not confer a better title than your own, was subject to these exceptions; if it was a sale in public market—market *ouvert*,

(') Part 3, s. 3.

(') 13 C. B. (N.S.), 519; 32 L. J. (C.

(') Law Rep., 9 C. P., 470; 10 Eng. P.), 132.
R., 249; 10 C. P., 384; 12 Eng. R., 418.

or if the article was purchased at a public sale, or if it was purchased, according to what I understand the old French law to have been, in a shop, if it was purchased from a *marchand*, that is to say, not a merchant in our sense, but a shopkeeper dealing in articles of that sort. That is an extension of the law of market *ouvert*, but I may observe not an extension going much beyond (not the ordinary English 679] common law but) *the custom of London, according to which every shop in London is a market *ouvert*, and therefore so far as the city of London goes, that which I understand to have been the old French law would not be more extensive than our English law.

But the Code here has altered that, and the Code here when introducing that exception makes it not merely, in public market, at a public sale, or from a shopkeeper, but it specially says from a "trader," it changes the word *marchand* into *commerçant*. I have no doubt whatever that the effect is that in Canada, by the Code, they have extended the principle into saying that a purchase from a merchant, in our modern sense, dealing with these articles may be good enough. But that is but a part of the principle of market *ouvert*. Now this case cannot be brought in any sense whatever within the word "purchase."

Now, my Lords, we have to see what is the effect of the change in the Canadian law brought about by the Factors Acts. Those acts were embodied in the Canadian law, or rather were transferred to Canada almost in their terms, and quite in their meaning. The Canadian lawyers who gave evidence in this case tell us, and I should have expected that it would be so even if I had not been told so by them, that in construing the effect of the Canadian law when taken from the English, they look to English decisions, and say the English law is to be understood, and is meant by these acts to be carried over, bodily, to Canada, and consequently *Cole v. North Western Bank* (*) is a good authority in Canada upon the construction of the Canadian acts. I should certainly have expected it to be so, and they say it is so.

But then the argument which is here used is that there are some things in the Canadian Code which give a different effect to it, and one must see what they are. First of all, there is the section which has been repeatedly mentioned, sect. 2268, which begins by saying that where you have got actual possession, three years shall give you a prescription. Now that section might very well have stopped there, but they thought it as well to go on and say what I should have

(*) Law Rep., 9 C. P., 470; 10 Eng. R., 249; 10 C. P., 334; 12 Eng. R., 418.

thought would have been implied, namely, prescription is not necessary to give a man a title when the circumstances under which he has acquired possession are such as to give *him a title without. If he has a title at once, he [680 need not wait for three years. And then they did refer to the old French law with the alteration which has been before pointed out. "This prescription is not, however, necessary to prevent reclaimer, if the thing had been bought in good faith in a fair or market, or at a public sale, or from a trader trading in similar articles." I must observe that, as I said before, a "trader" is here put in, that is to say, a "*com-mercant*" instead of a "*marchand*;" and, if I am right in my notion of what the old French law meant, it does considerably extend it. "Nor in commercial matters generally." What does that mean? I take it that it means that where, according to the commercial law, either as it existed in Canada before, or as it has been made by the Civil Code, and the subsequent enactments which have been brought in, a title has been acquired, you do not need to wait for three years. What occurs to one upon that at the first blush of the matter is, that where it is a negotiable security, such as a promissory note or a bill of exchange, or the like, you certainly do not need prescription to give you a right to that, and there would be other cases which would be included. Whatever is included within the Factors' Acts I think would be "commercial matters," and would come in; and whatever has been sold or pledged in such a way that the sale or pledge would be good under the Factors' Acts, is understood in Canada to be brought in there. In these cases you do not want your prescription, because you have your right at once. That is the sense to be put upon those words "nor in commercial matters generally." It could not be for a moment contended that they meant that wherever anybody had got hold of, had corporeal possession of, goods in a commercial transaction, he should instantly have as good title to them as if he had kept them for three years. That would be quite an impossibility. The law could not have meant that. I think it may be limited in the way I have explained.

Now let us turn back to the other clause which has been so much relied on with regard to sale. The general rule as laid down is perfectly right, "that the sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles." Of these three following articles we have nothing to do with the third. The second *article, No. 1489, is that upon which I [681

have already dwelt—it contains the exception of an article “bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles,” in which case, even though it be stolen, it cannot be reclaimed without tendering the price which was actually paid. But then Article 1488, which is the section upon which reliance is mostly placed, is this, “The sale is valid if it be a commercial matter.” That, to my mind, does plainly mean to say that a sale is valid if it be a “commercial matter,” and the transaction is such that the sale is according to the law-merchant or according to the other provisions of this Code, or probably according to the general French law existing in Canada at the time. If it would be good according to that law, then it shall be valid. Still it does not say the contrary. I have already said, and this is the principal reason why I call attention to it, that there is no ground given in the course of this case, that I can see, for supposing that in the Canadian law, antecedent to the introduction of this Civil Code, there was any law which would have made a sale under circumstances like the present, that is to say, a sale by a tanner who had got possession of his customer's leather, and was requested by that customer to send home the goods he had been tanning by sea to him. There was no law in Canada that would have made that good in the way even of a sale, and still less of a pledge.

Then I think, in order to put sense upon that article, we are driven to look at other parts of the Code and see what light they throw upon it. Now, in the chapter upon Mandate, chapter 5, “of brokers, factors, and other commercial agents,” we have cases which make very good sense of this. Article 1739 commences by saying that “any one may safely purchase from an agent who is intrusted with the possession of goods,” and an agent intrusted with goods may pledge them. Then it says that an agent intrusted with goods has power to do a variety of things, and there are several similar provisions all worded “an agent intrusted with the possession of goods;” and pointing to sale and pledge, which would be in this matter (which would be a commercial matter) made valid in the eye of the law. That seems to me completely to satisfy the meaning of Article 1488.

Now, my Lords, there remains only a word or two to be [682] said *upon the rest of the case. The judgment in the Canadian case of *Cassils v. Crawford* (1), which was so much relied upon, has not the same effect as a decision here.

(1) In the Q. B. at Montreal, March, 1876.

Decisions of the courts in Canada have not the same effect as we are in the habit of giving to decisions in our courts here. It is explained in the course of the evidence that a judgment in Canada is a matter which the courts afterwards may consider as much as they like, but it has no binding authority at all. And when I look at the reasons given for the judgment in *Cassils v. Crawford* I cannot agree with them in the least. It appears to me that some of those judges irrelevantly (for it was not the point before them) assuming—which I have already pointed out is not my opinion—that this would be a good sale because it would be a matter of commerce, they say it follows necessarily that a pledge would be so too, for pledges must be so, wherever sales would be so. The first of the judges, who seems to be the only one whose decision was overruled, has very fairly and well stated the objection to that; he said that a purchase from a trader might very well be held to be good inasmuch as it is fairly and openly done, yet a pledge by a trader was a matter in which there was not the same degree of openness according to practice, and which was not so much considered. He states that as a very powerful argument against him, but he does not answer the reasoning but overrules it. That being so, I certainly pressed Mr. Vaughan Williams several times for an answer to that reasoning, and he was obliged at last to own that he could not supply any. I do not blame him at all—there is none to supply—the argument was unanswerable. There was no right to require Mr. Vaughan Williams to do that. I do not think anything in the slightest degree could be said upon that point.

As to the other suggestions which follow from it, taking the Canadian law of factors to be the same as our own, to suggest that a man who shipped goods, as Bonnell did here, could in any sense be said to be an agent for the sale of the goods, seems to me impossible; and I could not comprehend or see any ground for the other suggestions which were made. Consequently, I perfectly agree in the conclusion which has been come to by the noble and learned Lord on the woolsack and the noble and learned Lord opposite.

*LORD WATSON: My Lords, I have no hesitation [683 whatever in agreeing with your Lordships upon all the points of this case which have been so largely discussed at the bar. It does not appear to me that with reference to the terms of the Canadian Code, or of those laws which introduce the Factors Acts into Canada, there can, upon the construction of them taken by themselves, be any doubt whatever that Mr. Bonnell was not an agent of the plaintiffs

(the respondents) in this case within the meaning of the Code and of those statutes. I quite agree in the observation which has been made by your Lordships, that the decisions of the English courts may be fairly looked to as authorities in construing those enactments, and, when thus regarded, I think they leave no doubt whatever upon the point, if indeed a doubt would have existed apart from them.

But a great deal has been made of a general clause of the nature of an exception introduced into the 2268th article of the Code. My Lords, it is a somewhat singular circumstance that in the evidence of those gentlemen learned in the law of Canada, who were examined as experts, there is only to be found one reference to this question, which has been so largely argued here. All the three experts, witnesses on behalf of the appellant, put his case entirely upon that title 8, chapter 5 of the Code, which deals with the case of the powers of brokers, factors, and other commercial agents. Only one of them, Mr. Kerr, refers to sect. 2268, and, as was pointed out by Lord Justice Cotton in his opinion in the court below, he only refers to it incidentally, and does not rely upon it as a ground for sustaining the appellant's case. My Lords, I think it quite out of the question to endeavor to put such a construction upon that clause as has been put upon it by two of the judges of the Canadian Court of Queen's Bench, in the case of *Cassils v. Crawford*⁽¹⁾. I do not think those judges were unanimous in the view which they took of it, for whilst two of their number, including Chief Justice Dorion, seemed to regard it as a separate and substantive enactment upon the subjects of sale and pledge (which are fully dealt with in other parts of the Code) two regard it (one of them was Mr. Justice Ramsay) as a defect [684] *in the formation of Article 2268, and another, Mr. Justice Sanborn, regards it as cumulative and reiterative. In that observation I rather agree with the learned justice, if he meant to suggest that it referred back to a previous part of the Code, not creating in itself an exception, but referring to those exceptions which had already been created.

My Lords, it seems to me to be very plain that there was no intention in introducing that sentence to create exceptions, but merely to refer to the fact that exceptions did exist. It was not intended to make a new law of sale, or a new law of pledge, or to alter the law already made. I think it was simply intended to state that prescription was not necessary, either in the enumerated cases or in any other case where the possessor of a corporeal movable had already

(¹) In the Q. B. at Montreal, March, 1876.

got a good title according to commercial law, leaving it to the law to determine whether that good title existed or not. But, my Lords, the grounds upon which I have arrived at that opinion have been so thoroughly explained by the noble and learned Lord on the woolsack, that I merely indicate my entire concurrence, not only with the result, but with all the observations which have fallen from your Lordships.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, June 25th, 1880.

Solicitors for appellant: *Ingle, Cooper & Holmes.*

Solicitor for respondent: *H. Montagu.*

See 16 Eng. Rep., 405 note; 19 id., 242 note; 24 id., 357 note; 25 id., 514 note; 27 id., 462 note; 27 id., 726 note; 28 id., 678 note; 29 id., 298 note; 29 id., 702 note; 30 id., 815 note; 33 id., 785 note.

An agent to sell cannot pledge: *Loring v. Brodie*, 134 Mass., 453.

C. & Co., cotton brokers, falsely represented that they had orders from certain manufacturing companies to buy cotton, and proposed to purchase plaintiffs' cotton, which offer was accepted, and plaintiffs sold 100 bales, as they supposed, to said companies on a credit. Bought and sold notes were delivered as usual, and the bales were delivered to C. & Co., to be shipped to said companies. C. & Co. stored the bales, raised money on warehouse receipt issued to P. & Co., and afterwards absconded. P. & Co. sold the bales to R. & Co., who paid for them at market rates and stored them with defendant.

Held, that C. & Co. obtained possession by larceny, and that defendant, although an innocent purchaser, obtained no title as against the true owner: *Hentz v. Miller*, 13 Weekly Dig., 224, 94 N. Y., 64.

A fraudulent purchaser of real or personal property may deal with it as the owner, and whoever purchases the property or takes a mortgage thereon from him or under him in good faith, in reference thereto, will be protected against the claim of the defrauded vendor: *Simpson v. Del Hoyo*, 94 N. Y., 180, 18 N. Y. Weekly Dig., 144.

One G., who was a member of the board, defendant herein, as attorney for it, received \$3,600.84 of its money,

which he wrongfully appropriated to his own use; he subsequently procured from plaintiff on a forged mortgage \$4,129.84, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G. credit therefor; the check was paid and the money received thereon used by defendant.

In an action to recover the amount so received by defendant from G., held that defendant having received the money in good faith and in the ordinary course of business, for a valuable consideration, was not liable.

The possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties.

The doctrine, that an antecedent debt is not such a consideration as will cut off the equities of third parties, in respect to negotiable securities obtained by fraud, has no application to money so obtained.

It seems, that while money remained on deposit in the bank, plaintiff could have compelled the bank to restore it, but having paid it out, without notice of any defect in the title of G., it was thereafter protected: *Stephens v. Board*, etc., 79 N. Y., 183.

A mere bailee for hire, though in possession, cannot give title to a third person.

Where there is a lease of personal

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property and delivery of possession to the lessee, if there are no other considerations entering into the transfer, the lease confers no such right as will protect *bona fide* purchase from the lessee.

But where the title has been *qualifiedly* passed with the possession, and the lien of the vendor is not reserved according to the condition of the statute requiring a written instrument of incumbrance duly recorded, the vendor parts with the possession at his peril, and if an equity in the property by purchase, concurring with the possession, is found in one who sells in open market to a *bona fide* purchaser, such sale carries title.

M. obtained possession of a buggy and harness by virtue of the following paper: "This is to certify, that I have hired of J. F. Bridget a buggy and harness for the term of three months from date, for the sum of \$25 per month, together with a cash payment of \$50, making in all \$125. The said John F. Bridget agreeing, at the end of the time above mentioned, to give me the privilege of purchasing the above named buggy and harness by paying an additional sum of \$125."

Held, that the equity of the property passed with the possession to M., and that subsequent *bona fide* purchaser in open market for full value obtained title.

Whether a demand is necessary in the case of a mere detention under claim of right before replevin can be maintained, *quære*: Bridget v. Cornish, 1 Mackey's Rep., 29.

H., the owner of chattels, relying on the representations of R., that he was the agent of L., agreed to sell the same to L. on credit, and H., in the belief that R. was such agent, delivered the chattels to him, when in fact he was not such agent nor had he authority to purchase for L., as he well knew: Held, that the property in the chattels did not pass from H., and that L. who bought the chattels of R. and converted them to his own use, without knowledge of the fraud, was liable to H. for their value; and the fact that R. at the time the chattels were delivered to him paid H. part of the price agreed on, would make no difference except as to the amount of recovery against L. In this case the seller never intended to pass any title to R., and none

to L., except on a direct sale by H. to L.; no title was intended to be vested in the fraudulent purchaser: Hamet v. Letcher, 37 Ohio St. R., 856, 15 Cent. L. J., 50.

1. In an action for the price of certain goods, the vendor, in order to prove shipment of the goods to the vendee, offered in evidence a shipping receipt of the articles, addressed to the vendee, which he testified was filled out by one of the clerks in his office, sent by a drayman with the goods to the shipping office, and returned by said drayman signed by the agent of the carrier in the ordinary course of business. He did not call any other evidence as to the receipt. Held, that it was not sufficiently proved to be admissible in evidence.

2. One J. W. S. called on A. and selected certain goods, which he desired to purchase, giving references to certain parties. On inquiry A. discovered that the parties in question did not know J. W. S. but did know J. S., who was a responsible party. J. W. S. being informed of this, stated that J. S. was his father, and ordered the goods to be charged and shipped to him. A. accordingly charged the goods to J. S. and shipped them to his address. On arriving at the station the goods were received by J. W. S. and carried off by him, he having frequently before received goods for his father. An action being subsequently brought by A. against J. S. for the price of the goods, defendant testified that his son J. W. S. had no authority from him to buy the articles, and that they never came into his possession. The court charged that if J. W. S. was in the habit of receiving and receipting goods for J. S. and so received these goods, then J. S. is bound to pay for them, although he did not authorize the purchase. Held, that this was error. The court should have instructed the jury that the act of J. W. S. in charging the goods to J. S. and having them shipped to his address, was a fraudulent act, and that if the jury found from the evidence that the plaintiff knew or had reason to believe that J. W. S. was buying them for himself, J. S. was not responsible unless he actually received them: Stephenson v. Grim, 100 Penn. St. R., 70.

Where a warehouseman pledges goods, the person to whom they are

pledged cannot transfer any title as against the owner, and is liable for conversion if he assumes to do so : *Thatcher v. Moors*, 184 Mass., 156.

One who innocently obtains the property of another from a third party, may, when informed of the right of the true owner, lawfully return it to the person from whom he obtained it, provided he does this before demand made or suit brought ; but if he asserts any title in himself, or if he returns it after demand made, he will be guilty of a conversion : *Rembaugh v. Phipps*, 75 Mo., 422.

Where an attorney, after the seller had exercised the right of stoppage *in transitu*, in order to aid the purchaser to defraud the seller, intercepted the goods and re-marked them to the purchaser, held he was liable to the seller. That such acts were foreign to his duties as an attorney : *Poole v. H. T.*, etc., 58 Tex., 184.

A. bought goods under a contract in writing, by which the title to the goods was to remain in the seller until paid for by instalments. Subsequently, A. bought other goods from time to time, and at each time a schedule of the goods was entered upon the original contract, and A. signed an agreement upon the same instrument, stating that he authorized the additions to the within "upon the same terms, conditions and agreements" as therein contained. A. made payments from time to time, for which receipts were given "as per lease." The entire amount due not having been paid, the seller took possession of the goods under the contract, and A. replevied the goods. At the trial of the action, there was no evidence as to the appropriation of any of the payments, by either party, to any particular portion of the goods. Held, that these facts would warrant a finding that the successive purchases were intended to be separate contracts ; and that a ruling was right, that the payments should be applied to the earliest items of the account ; and that when they amounted to the price of the goods bought at any one time, there was a payment for that lot.

A., who had possession of chattels under a contract of sale by which they were to become his property on payment for them, assigned his interest in the contract to B. and took a writing

from B., which stated that A. was to have the chattels on payment of an amount advanced. A. retained possession of the chattels and paid B. the amount advanced, but no reassignment of the contract was made. Subsequently the seller of the chattels took possession of them for an alleged breach of the contract of sale. Held, that the transactions between A. and B. did not prevent A. from maintaining an action of replevin.

A. was in possession of chattels bought, under different contracts, from B., by the terms of which the chattels were to become A.'s property when paid for. Being notified by B. that he would take possession of the chattels for breach of the contract, A. applied to C. for assistance, representing that a certain sum was due on account of the chattels, but saying nothing as to that sum being due upon a particular part of them. C. declined to assist A., and subsequently bought B.'s interest in the contracts for the sum which A. had represented was due, and took possession of all the chattels : Held, in an action of replevin by A. against C., that A. was not estopped to deny that the amount he represented as due did not apply to any particular chattels.

If goods are sold to A. under an agreement that they shall be paid for by instalments, and shall become the property of the purchaser when paid for, a payment made by a third person who has bought the interest of the seller in the contract does not enure to the benefit of A.

If B. sells goods to A. by a conditional sale, and afterwards takes possession of them for an alleged breach of condition, and sells them to C., in whose possession they are when taken by A. by a writ of replevin, the joinder of B. as a party defendant is wrongful : *Sweet v. Boyce*, 134 Mass., 881.

When the sale and delivery of personal property was made with an agreement by the purchaser to give security for the purchase-money or do some act as a part of the transaction, such sale is conditional, and the title to the property does not pass until the thing is done by the purchaser or is waived by the vendor : *Thorp v. Fowler*, 57 Iowa, 541.

Mere evidence that it was understood by seller and purchaser that the sale

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was to be for cash, without evidence that the seller at the time of delivering the goods, exacted payment or attached any other condition to the delivery, is insufficient to overcome the *prima facie* case of an unconditional delivery. Where there is an absolute and unconditional delivery of goods sold without exacting the performance of any condition precedent, the vendor will be presumed to have abandoned the security he had provided, and to have elected to trust to the personal security of the vendee. *Martin v. Writa*, 11 Bradw., 587.

Upon a sale on condition that the title shall not vest in the vendee until payment of the purchase-money, he cannot, as against the vendor, transfer title to a purchaser from him: 8 Southern Law Rev. (N.S.), 228.

Alabama: *Fairbanks, etc., v. Eureka, etc.*, 67 Ala., 109; even though notes be given and some paid, *Sumner v. Woods, Id.*, 139.

Canada, Upper: *McDonald v. Forrester*, 29 Grant's Chy., 300.

Michigan: *Ingersoll v. Barnes*, 47 Mich., 104; *Marquette, etc., v. Jeffery*, 13 N. W. Repr., 592, 49 Mich., 283, 7 Vir. L. J., 184.

Nebraska: *McCormick v. Stevenson*, 13 Neb., 70.

New Hampshire: *Holt v. Holt*, 58 N. H., 276.

New York: *Hughes v. Baxter*, 18 N. Y. Weekly Dig., 91; *Jessup, etc., v. Burn*, 16 id., 415; S. C., mem., 29 Hun, 480; *Brown v. Thurber*, 1 City Cts. Rep., 322.

But see *Conner v. Cunningham*, 77 N. Y., 391; *Heintermister v. Lane*, 27 Hun, 497, 15 N. Y. Weekly Dig., 285.

North Carolina: *Vasser v. Buxton*, 86 N. C., 335.

Nova Scotia: *Matter of Pyke*, 8 Nova Scotia Dec., 342.

Pennsylvania: In this State the contrary rule is held, and it is held creditors of the vendee may levy.

In *Pennsylvania* the contrary rule is held, and it is held creditors of the vendee may levy upon and sell the property: *Brunswick v. Hoover*, 95 Penn. St., 508.

Vermont: This State has a statute upon the subject. The recent cases there are under that: *McPhail v. Yerry*, 55 Verm., 174; *Morgan v. Robinson, Id.*, 367.

In a contract by the plaintiffs to build certain machines for the defendants, the plaintiffs covenanted and agreed to construct the machines in a certain manner, and that the machines would do certain work in a manner described in the contract. The complaint in an action to recover the contract price of the machines, alleged a delivery and acceptance by the defendants of the machines under the contract; and the answer alleged that the plaintiffs had failed to perform the agreement upon their part, and that the defendants had refused to accept the machines manufactured by the plaintiffs, because they failed to conform to the agreement. Held, that an instruction to the jury that if the defendants absolutely accepted machines that were defective they must pay for them, and if the machines were accompanied by a warranty that they would accomplish a certain result, the remedy of the defendants was for a breach of that warranty, was error, for which a judgment for the plaintiffs must be reversed, since such judgment would be a bar to any action by the defendants for a breach of the warranty contained in the agreement: *Bliss v. Locke*, 9 Daly, 526.

If a chattel is sold and delivered upon condition that it shall be paid for on a certain day, and shall remain the property of the seller until paid for, the seller has not such possession or right to immediate possession as will support an action of tort in the nature of trover against an officer who has attached the chattel as the property of the purchaser, brought before the day named for payment: *Newhall v. Kingsbury*, 131 Mass., 445.

The rule that title will not pass to the vendee on a sale conditional that title shall not pass until payment therefor, does not obtain where the property is delivered to the buyer for consumption, or for sale, or to be dealt with in any way inconsistent with the ownership of the seller, or in any manner which would necessarily destroy his right of property: *Brown v. Thurber*, 1 City Cts. Rep., 322.

Contra: *Lewis v. McCabe*, 15 Reporter, 141.

Where a fixture is placed upon realty under an agreement that title thereto shall not vest in the owner of such realty till payment, a purchaser

of the realty with sufficient knowledge to put him on inquiry does not acquire title as against the vendor: *Ingersoll v. Barnes*, 47 Mich., 104.

In *Nova Scotia*, it seems to be held that the seller, on reclaiming property sold conditionally, must pay the vendee what he has paid thereon: *Matter of Pyke*, 3 Nova Scotia Dec., 342.

Though the purchaser be in default, on conditional sale, she may in equity be allowed to retain the property on payment of the amount unpaid: *Meagher v. Hollenberg*, 9 Lea (Tenn.), 393.

A mortgagee of goods can only recover against an auctioneer who has sold them by direction of the mortgagor, the actual damage he has sustained by the injury to the security: *Myers v. Marsh*, 1 Cababe & Ellis, 116, 117 note.

Where the manager of a theatrical troupe engaged an advance agent "for a season of twelve weeks or more if agreeable," it was held to be an employment to terminate in twelve weeks unless continued by mutual agreement: *Gartlan v. Leach*, 1 City Cts. Rep., 349.

Plaintiff sold defendant a machine with warranty, to be paid for if upon trial it proved to be as warranted. After trying it, defendant declined to take it and so notified plaintiff, but continued to use it for some days. He then offered to return it to plaintiff but plaintiff refused to receive it, and defendant left it on the sidewalk in front of plaintiff's storeroom. Held, that these facts would not sustain an action for conversion. If the machine was really what it was warranted to be, plaintiff's remedy was by action on the contract for the purchase money; if not, he could still have recovered for the use of the machine after defendant gave notice that he would not take it: *McCormack v. Gilliland*, 76 Missouri, 655.

Defendant sold to plaintiffs a quantity of tea, agreeing that if there was any left on plaintiff's hands at a certain date he would take it back at the advanced price of ten cents per pound. Held an entire agreement, consisting of one conditional contract of sale and not of two contracts; and that consequently the delivery of the goods by defendant satisfied the statute of frauds, and plaintiffs were entitled to recover for defendant's refusal to take back the

quantity left unsold: *Lumsden v. Davis*, 46 U. C. Q. B., 1.

In consideration of a parol agreement by defendant to deliver to plaintiff, for temporary keeping, all stock passing eastward on its road, plaintiff conveyed certain lands to defendant. Defendant having repudiated its agreement, this action was brought for the value of the lands. Held, that if the agreement was one to continue along to the satisfaction of defendant and the drovers, defendant could not put an end to it on a mere caprice or whim, but would be bound to allow it to continue as long as plaintiff performed it as required; that whether defendant was justified in its conduct by the fact that the yard was in a muddy and filthy condition, would depend on whether it became so by any default, improper conduct or failure on plaintiff's part to fulfil his obligations; that to entitle plaintiff to recover, he must show that he would have been able, if unmolested by defendant, to reimburse himself for the value of the land or some part of it, and that it was for the jury to determine what profits, if any, would have been realized by plaintiff under the agreement: *Day v. N. Y. Cent.*, 15 N. Y. Weekly Dig., 170; S.C., mem., 89 N. Y., 616.

A contract for a machine, if it is "satisfactory, or does what is claimed for it," is binding if the machine meets the warranty, whether the purchaser is satisfied or not: *Clark v. Rice*, 46 Mich., 308.

Under a special contract of employment, by which it was left to the defendant to determine and fix plaintiff's compensation after the services were performed, at such price and amount as, under all the circumstances, the defendant should consider right and proper, the defendant having determined and fixed the amount pursuant to the contract; held, 1. That in the absence of fraud or bad faith the amount so fixed is the measure of the compensation to which plaintiff is entitled; 2. That the mere fact that defendant fixed the compensation at an amount considerably less than the trial court found upon the evidence before it the services were reasonably worth, is not of itself sufficient to justify an inference of fraud or bad faith: *Butler v. Winona*, etc., 28 Minn., 205.

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Plaintiff, who owned certain real estate in Brooklyn, agreed with defendant to exchange it for property of the latter located in Texas, the contract not to be binding on plaintiff and to become void, unless confirmed and approved by one T., after a personal examination of defendant's property made by him. T. went to Texas but failed to find the property and did not approve the exchange. In an action brought on the contract, the complaint demanding damages for a breach thereof, for the amount of T.'s bill for services: Held, that the want of T.'s approval reduced the contract to a nullity, so that the parties stood in the same position as though it had never existed, and plaintiff could therefore claim nothing for breach of its provisions: *Dey v. Nason*, 17 N. Y. Weekly Dig., 113.

A servant was employed upon trial for a week, with a promise that, if she suited, the employment would be continued through the summer months and until September 1st. Before the end of the week the employer having declared that if she suited, the servant said: "Then as long as I suit you, there is no fear for the summer months;" to which the employer replied affirmatively. Held, that there was not at absolute employment until September 1st, but merely a conditional one, dependent upon the servant continuing to suit the employer: *Davenny v. Shattuck*, 9 Daly, 66.

Where a person purchases a mare with a warranty of soundness, and the seller agrees that if the mare is not what she is warranted to be that he will take her back, or make the matter satisfactory in some other way, and the mare is unsound and dies soon after the sale, but before she dies the purchaser tenders her back to the seller and attempts to rescind the contract of sale; held, under such circumstances, that the purchaser may rescind such contract: *Latham v. Hartford*, 27 Kans., 249.

A stipulation in a contract of sale that it shall be of no effect unless the goods are satisfactory, is to be construed, according to the circumstances, as reserving to the purchaser the absolute right to reject them without giving any reason, or as binding him to decide on fair and reasonable grounds.

In one case his decision cannot be reviewed, but it can be in the other: *Wood, etc., v. Smith*, 50 Mich., 565.

A contract for the sale of a machine may be made to include a stipulation that the contract shall be of no effect unless the machine works to the purchaser's satisfaction: *Wood, etc., v. Smith*, 50 Mich., 565.

Where goods are sold on trial, to be paid for upon approval, there is no sale until approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial, where no period is fixed beyond a reasonable time: *Shimp v. Hickman*, 15 Lanc. Bar, 67, *Chester Com. Pl.*

In *Grant v. Burch* (26 Hun, 376), the court said:

"The last objection urged by the plaintiffs is, that the judge refused to charge, at their request, that if the defendant took the reaper on trial he was bound to give it a reasonable trial. The defendant insisted (and that presented one of the issues and the principal issue) that the bargain was, that the reaper should be left there for him on trial, and that if he liked the machine and was suited with it, he was to keep it and pay for it. The plaintiffs insisted that the defendant was to purchase the machine, and that if it did first class work he was to pay for it; if not, he was to notify the plaintiffs, and they would put it in order. Now we cannot say that the judge erred in his refusal. If the machine was, as the defendant claimed, only left on trial, and was to be kept only if the defendant was suited with it, we cannot say that the defendant was under any obligation at all to make a trial. Such an arrangement gives the expected purchaser the privilege of trying the machine, but it leaves it quite to his own judgment whether he is suited, and if it is for his own judgment to decide whether he is suited, then the giving a fair trial is of no consequence. If the bargain had been, that if the reaper worked well the defendant was to keep it, then he might be bound to give it a fair trial. But if the bargain was only, that if it suited him he was to keep it, then the keeping it was left to his choice. He was to determine, and not a jury, whether or not it suited him."

Where evidence is given on both sides as to whether property was sold on condition that it worked well, such evidence presents a question of fact for the jury: *De Bevoise v. Providence*, etc., 89 N. Y., 614, 14 N. Y. Weekly Dig., 547.

In an action for the purchase price of a machine, where the defence is that the sale was with warranty, and on condition that if it did not work as represented, it might be returned, plaintiff is entitled to the benefit of any admissions of defendant tending to establish satisfaction with the machine, and it is error to exclude them.

A copy of a letter in relation to the subject of the action, written by plaintiff, is admissible to be read in connection with defendant's letter in reply thereto: *Nunn v. Reitzenthaler*, 18 N. Y. Weekly Dig., 114, mem., 29 Hun, 616.

Where chattels are mortgaged in another State and left in the mortgagor's possession, and he brings them into Michigan, the record of the mortgage in

the other State is not notice to purchasers.

Where a valuable consideration is paid for goods, the fact that it is much below their value is not conclusive against the purchaser's good faith: *Boydson v. Goodrich*, 49 Mich., 65.

The parties must assent to the same thing in the same sense, or they make no contract: *Wagner v. Egleston*, 49 Mich., 218; *Cowie v. Remfry*, 8 Moore, Ind. App., 448; *Atkins v. Van Buren*, 77 Ind., 847.

In a child's action for negligent injuries to him in the street, evidence that he and his sister were accustomed to play in the street unattended is incompetent on the part of defendant. (*People v. Bush*, 3 Park. Cr. R., 552, overruled). If such evidence be competent on the question of the mother's knowledge, the offer should point explicitly to this purpose: *Smith v. Grand St.*, etc., 11 Abb. N. C., 62, citing *Maciller v. Express*, etc., 61 N. Y., 316, and *Warner v. N. Y. Central*, 44 id., 465.

[5 Appeal Cases, 685.]

H.L. (E.), June 3, 4, 7, 8, 1880.

[HOUSE OF LORDS.]

*JOHN WALLINGFORD, *Appellant*; and THE DIRECTORS, &c., of the MUTUAL SOCIETY, and the Official Liquidator thereof, *Respondents*. [685]

Judicature Act, Rules and Orders—Lottery—Penalty—Mortgage—Accounts.

*In a mortgage bond, given to secure the due payment, by instalments, of a sum due, a provision making the total sum due enforceable on any default, is not to be considered a penalty. [686]

A society constituted (avowedly) for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts.

A general allegation of fraud, however strong the words used, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice.

Therefore, an account directed to be taken in this case, where such an allegation had been made, was directed to be taken without regard to this insufficient allegation of fraud.

The judgment and execution were ordered to stand as security.

General directions as to the mode of taking the account.

APPEAL against a decision of the Court of Appeal in a matter relating to orders under the Judicature Act, 1875.

On the 20th of September, 1868, the Mutual Society was registered as an unlimited company under the Companies Acts of 1862, 1867. The declared object of the society was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation, to secure payment of such advances by taking over and holding real or other securities—and ultimately to divide among the members all the profits that had been made. The directors had powers to do all things necessary to accomplish these purposes. The appellant (who was originally the defendant in the action) was a member of the society, and for some years acted as its agent. The mode of operation appeared to be this: To obtain subscriptions from members, to advance them money, on interest, upon “certificates of appropriation.” The 9th “article of association” declared that “an appropriation certificate shall be a document issued to every such member on his entering the society, and shall certify his title to receive an advance out of the funds of the society, as well as to participate in the profits pursuant to the conditions and regulations hereinafter contained.” Any member might nominate a life upon which a certificate was to be held, and the members holding these life certificates were to be entitled to tontine [687] bonuses. An “appropriation,” or advance was to be made (Art. 22 B.) “according to the number of certificates held by the member successful in obtaining the appropriation.” By Art. 27 it was declared that “appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively.” All appropriations were to be repaid by equal quarterly payments extending over twenty years from the advance. The appellant took up appropriation certificates and obtained advances. The directors complained that he did not, regularly, make the required payments. He gave them certain securities, and, among others, on real property, called “mortgage bonds.” On the 3d of August, 1878, an action was commenced against him for a considerable sum of money alleged to be the accumulation of loans, interest, and subscriptions. The action was by writ, which was specially indorsed with the particulars of the amount claimed (£12,703 10s.) pursuant to the provisions of Order III, rule 6, of the Judicature Act, 1875. The appellant entered an appearance to the writ, after which, under Order XIV, rule 1a, the respondents took out a summons for leave to sign judg-

ment on an affidavit that there was "no defence" to the action (').

The appellant alleged generally that he had by fraud and misrepresentation been induced to enter the society, but did not give particular instances of the alleged fraud. This charge he afterwards withdrew. He also alleged disputed accounts, and counter-claims, and insisted that he had a good defence to the action.

This summons was heard before Master Francis (one of the *Masters of the Common Pleas Division) who, in 1688 the result, made an order that, on payment by the appellant into court, within ten days, of £11,703 10s., or giving security to that amount, the appellant should have leave to defend the action. The appellant took out a summons before Mr. Justice Manisty, at Chambers, for a dismissal of this order, and Mr. Justice Manisty varied it by reducing the sum to £5,000 payable into court within one month. By Order LIV, rule 6, "Every appeal to the court from any decision at Chambers, shall be by motion, and shall be made within eight days from the decision appealed against." By Order LVII, rule 6, the time may be enlarged by a court or judge, and such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. Nothing was done by the appellant as to the order of Mr. Justice Manisty within one month. Judgment was signed, and on the 10th of October, 1878, the costs were taxed. On the 24th of October, 1878, a *fi. fa.* was issued to the sheriff of Hampshire to levy £7,091 14s. 5d., that being the balance then claimed as due, after giving credit for the securities in the possession of the society. Execution was levied. On the 26th of October the appellant took out a summons for time to appeal to the Divisional Court against the order of Mr. Justice Manisty. This was supported by an affidavit of the clerk to the appellant's solicitors stating that the motion required by Order LIV, rule 6, had not been made as it was vacation

(1) Order xiv, rule 1a:—"When the defendant appears to a writ of summons specially indorsed under Order III, rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the court or a judge why the plaintiff should not be at liberty to sign final

judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The court or a judge may thereupon, unless the defendant by affidavit or otherwise satisfy the court or a judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly."

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and no Divisional Court was sitting. There was an affidavit on the other side stating all the circumstances of the case. The summons was heard before Mr. Justice Field, who dismissed it with costs. On the 2d of November a motion was made in the Common Pleas Division to review the decision of Mr. Justice Manisty on the ground that a good defence on the merits had been shown by the affidavits before him. It was also treated as an appeal against the order of Mr. Justice Field refusing the extension of time. The Common Pleas Divisional Court dismissed the summons. The case was taken to the Court of Appeal. A preliminary objection was then taken on the ground that the Common Pleas Division had not purported, nor had power, to deal with the order of Mr. Justice Manisty, and that therefore the appeal could not be supported. The Appeal Court dismissed the [689] *appeal with costs. This appeal was then brought to this House. The irregularity of these various judicial orders was insisted on, and it was urged that in a case, like this, of complicated accounts, it was impossible to say there was no defence. It was also urged that the constitution of the society itself was illegal, as its promised benefits were to be given to the members by drawings, which made the society illegal under the Lottery Acts, whereby the respondents were rendered incapable of suing the appellant under his covenants, and also that the right to enforce payment of all that was due, on default being made as to any part, was in law a penalty and therefore could not be enforced.

In May, 1879, the appellant commenced an action against the respondent in Chancery for an account, and prayed that, on payment of what might be found to be justly due, he might be allowed to redeem his securities.

On the 8th of November, 1879, an order was made for winding up the society. The proceedings in the action in Chancery were suspended.

Mr. *Wills*, Q.C., Mr. *Edward Hadley*, Mr. *Thrupp*, and Mr. *J. Bradley Dyne*, appeared for the appellant: *Crom v. Samuels* ⁽¹⁾; *Fox v. Wallis* ⁽²⁾; *Burke v. Rooney* ⁽³⁾; *Gibbons v. The London Financial Association* ⁽⁴⁾; *Bell v. The North Staffordshire Railway Company* ⁽⁵⁾; *Runtz v. Sheffield* ⁽⁶⁾; *Stirling v. Du Barry* ⁽⁷⁾, on the subject of the Orders and Rules, were cited and commented on; and *Ex parte Alston*, *In re Holland* ⁽⁸⁾, was referred to on the sub-

⁽¹⁾ 2 C. P. D., 21.

⁽²⁾ 2 C. P. D., 45.

⁽³⁾ 4 C. P. D., 228.

⁽⁴⁾ 4 C. P. D., 263.

⁽⁵⁾ 4 Q. B. D., 205.

⁽⁶⁾ 4 Ex. D., 150.

⁽⁷⁾ 5 Q. B. D., 65.

⁽⁸⁾ Law Rep., 4 Ch. App., 168.

ject of the claim to have an account taken and the securities marshalled. *Fisher v. Bridges* (') and *Henderson v. Lacon* (') were also cited; and the Lottery Acts.

Mr. *Joseph Brown*, Q.C., and Mr. *Reginald Brown*, were for the respondents: *Bonafous v. Rybot* ('), *Gowlett v. Hanforth* ('), *James v. *Thomas* ('), and *Thompson v. Hudson* ('), were cited to show that enforcement of the payment of all that was due when one default was made was not a penalty. *Matterson v. Elderfield* ('), to explain the rights of a member of a society of this kind, on accounts being taken, and *Smeeton v. Collier* (') in support of the power of a judge at chambers to make an order, with reference to the delivery up of a mortgage deed.

At the close of the argument the Lord Chancellor read a sketch of the order which the House proposed to make in this case. Some verbal alterations were afterwards made, and the order finally stood as now printed at the end of their Lordships' judgments.

THE LORD CHANCELLOR (Lord Selborne): (a) * *

* * * * *

*My Lords, it may be right, since that has been [696 fully argued, to express an opinion upon the point, whether the appellant has shown, that in this case the mortgage bond ought to be regarded as making the total sum mentioned payable merely by way of penalty, to secure the regular payment of the instalments; so that the debt ought to be regarded as still payable by those instalments only, even after default had been made in the payment of a particular instalment. Your Lordships will not, I believe, think it necessary to make any declaration upon the face of the order on that point; but, for my own part, I feel bound to say that the appellant has not succeeded in satisfying my mind, that it would be right for the House to declare that the account is to be taken on any such footing. The real matter seems to stand thus. These mortgage bonds were given to secure the £8,000, which sum was treated as advanced, although money did not pass, and also the premiums, which would become due by instalments according to the rules of the society; and the payment of which under

(1) 8 EL. & BL., 642.

(2) Law Rep., 5 Eq., 249.

(3) 3 BARR., 1370.

(4) 2 W. BL., 958.

(5) 5 B. & AD., 40.

(6) Law Rep., 4 H. L., 1.

(7) Law Rep., 4 Ch. App., 207.

(8) 1 EX., 457.

(a) The portion of opinion bearing on the practice under the English Rule is omitted.
N. C. M.

those rules was liable to be accelerated, if any of the instalments were not punctually paid. I cannot think that such an acceleration of payments has anything in common with a penalty. It was a contract for certain payments which were *debita in presenti* although *solvenda in futuro*; and, being such, it is consistent both with principle and with authority to hold, that if the party who ought to have paid them, or any of them, at the proper time failed to do so, the default was his own, and the time might lawfully be accelerated for the other payments which were originally deferred. I think, therefore, that it would not be right for your Lordships in your order to give effect to that contention on the part of the appellant; but that the account must go at large upon the securities as they stand.

There were two other contentions, going to the whole demand; one, that this was a transaction within the Lottery Acts, and the other that it was a fraud.

With regard to the Lottery Acts, the learned junior counsel for the appellant referred your Lordships to the terms of 697] the *acts on which he principally relied. One of those acts plainly, on the face of its recitals, (the enacting part not departing from those recitals,) had reference to gambling transactions only; and in my judgment this was not a gambling transaction, within the meaning of that act. The other had reference to persons who kept lottery offices, at which the public were invited to pay for lottery tickets; and that act could have no application to this case. No case therefore, in my judgment, was made, worthy of a moment's consideration, in support of the contention that these were illegal transactions under the Lottery Acts.

With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded; and the conclusion is, that it is only for the purpose of taking the account that any defence ought to be admitted in this case.

I am not sure that it is necessary to say anything more. The parties have been informed of the form and nature of the order which your Lordships think it would be right to make for the purpose of doing justice in this case; and,

subject to the questions, which your Lordships will have decided, whether any relief at all should be given to the appellant, and whether an account should be directed or not, they have agreed to certain terms, which I think are perfectly reasonable; according to which, in the account to be directed, credit is to be given for a certain sum as the value of the real security not yet realized; and the respondents are to pay into court the sum which they levied under the execution, namely, £1,300.

With respect to the execution, a few words seem to be necessary. Upon the principle of your Lordships' judgment, if you should agree with what I have said, there ought to have been no execution issued at all, because there ought not to have been a judgment upon which execution could have been issued, *without the leave of the court [698 after an account taken. But the thing having been actually done, and having become one of the inextricable elements of the case with which your Lordships have to deal, it does not appear to me, and I think it will not appear to your Lordships, to be necessary for the purposes of justice, that that execution should be treated as if it had never taken place. For some purposes it cannot be so treated, because the £1,300 must be paid into court; and I may also perhaps mention that I have myself been considerably impressed with the sum indorsed for the levy upon the writ of execution as evidence that the original order ought not to have been made; because, according to the general orders of the court which regulate executions, the sum actually due ought to be indorsed for levy upon the writ; and in one of the affidavits in this case, language is used which seems to me to signify that the indorsement really represented not some voluntary retrocession of the respondents from the extent of their full right, but their own view of what was actually due to them, at the time when the judgment was signed for a much larger amount.

In that state of circumstances the execution itself has been an element tending, at least in my view, to assist the appellant's case; and it appears to me that full justice will be done if the execution, now that it has been actually issued, as well as the judgment, should stand as security for what may be found due upon the footing of the account that is to be taken.

My Lords, I apprehend that being thus, by the order of your Lordships' House, treated as a mere security between these parties, no other court will act upon that execution for any purpose which might affect the interests of the parties.

It will be regarded merely in the same light in which a judgment would formerly have been regarded, when entered up by order of a court of equity by way of security, until it becomes, (if it should ever become,) an effective execution upon which a farther levy may be made. It cannot in the meantime operate (as I apprehend) anywhere to the appellant's prejudice.

I think it is unnecessary to say more except to move your Lordships, that the order under appeal be discharged and that an order be made in the terms which have been read to your Lordships, namely :—[His Lordship read the proposed 699] form of the order, *which was afterwards settled and entered on the Journals of the House, see *post*, p. 711.]

LORD HATHERLEY: My Lords, I concur in the views which have just been expressed by my noble and learned friend on the woolsack, and I simply recapitulate the different heads under which those opinions upon the case have been pronounced, because I wish to show that I have not omitted them from my consideration, but I do not go over them for the purpose of attempting to strengthen the reasons which have already been assigned. * * *

701] *There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

Then, my Lords, we come to another point, and that is with reference to the question whether this is or is not a lottery. I will only observe upon that, that if this were held to be a lottery, nearly every one of the societies I have referred to, namely, building societies, and a great many other societies framed upon a similar footing, might be found to fall within the enactments against lotteries. But I apprehend that this is entirely wide and *far apart from the statutes which have been referred to. I do not think it necessary to say a word more upon that farther than to say that I entirely agree in the opinion which has been already pronounced.

The other question which was much argued before your Lordships was the question of penalty. I apprehend that there again the case is quite clear. The illustration of the form adopted in mortgages is a very good illustration, I think, of what the true principle is. The form adopted long since—I do not know whether it is still continued or not—in mortgages, was when you wished to reserve in reality interest at 4 per cent., to reserve the interest by contract at 5 per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at 5 per cent. to be reduced, in the event of your punctual payment, to 4 per cent.; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. If that definite and fixed time were exceeded, then the original contract revived in all its force. Sometimes mortgage deeds, being somewhat unskilfully drawn, interest at 4 per cent. was reserved by the contract to be raised to 5 per cent. if there was non-payment at a particular day; and although that brings the case to an extremely fine and nice distinction, it all the better illustrates the rule which has been applied at all times by the courts, with reference to this question of penalty. If there had been indulgence at any time upon given terms, as long as those terms are observed, the indulgence lasts. When those terms are departed from the indulgence at once fails, and the original contract is revived in full force. The basis of the whole transaction, of course, is contract, and in this particular case we have before us a sum of £6,000 in money or money's worth advanced on a given day, and the contract is that at a distant day a much larger sum, exceeding in fact, or nearly amounting to double the original sum, is to be paid by quarterly instalments, of which there are to be eighty. That contract is not only contained in the deed, but it is contained in the rules of the society under *which [703 that mortgage deed is made as a security for the performance of those rules. There is nothing to prevent that contract being carried out to the full extent, especially now that the Usury Laws are at an end, and no question can possibly, as it seems to me, arise upon a deed framed as this is, as to whether or not it is a case of penalty or contract. The sum is plainly secured by a contract and that contract must be observed.

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My Lords, I do not think there is any other question which has been discussed before us which I need advert to. I will only say that the form of decree which has already been communicated in part, or, I think, almost wholly to the parties, as being the form of judgment which your Lordships would be invited by my noble and learned friend, the Lord Chancellor, to pronounce, appears to me a correct form of decision to arrive at upon this case, which is somewhat complicated and rather tedious in its nature and character. I think that decree will render ample justice to all the parties concerned.

LORD BLACKBURN: * * * * *

704] *Looking at the affidavits (they are very long and I will not go through them) which were used before Mr. 705] Justice Manisty, I *think that in none of those particulars did the appellant satisfy the burden that was cast upon him. He makes general statements of fraud, but nowhere does he condescend upon any particular of fraud, such as in my mind, if I had been in Mr. Justice Manisty's place, would have made me think that it was at all fit that he should be allowed to defend upon that ground. There are long statements resulting in saying that this society was illegal upon various grounds, which I cannot follow at all. One ground, among others, is, because there was a drawing of lots on one occasion, therefore it was illegal as coming under the Lottery Acts. I cannot think that that was a good ground of defence.

There was one point, and only one, which was argued a good deal here. I do not observe that it was urged in the courts below, but it was argued by Mr. Wills here. He said taking the form of deed, the £11,000 and odd hundred pounds should be considered as a penalty to secure the repayment of the different instalments, and not as a debt which upon the non-payment of the instalments should be recovered. I do not think that that is, tenable for the reasons which have in fact been assigned before. The object and the nature of the society here, and the whole terms of the bargain here were these:—If you choose to borrow the money, you shall name a sum which is to be added to the principal and to be repaid; and as it is the very essence of the society that we should have punctual payments, if you make default in paying the instalments, the whole sum shall become payable at once. Speaking not judicially, but as giving my own opinion, I do not think that a society framed upon a principle of this sort could have gone on anyhow, even if the instalments had been punctually paid;

but it is self-evident that unless the instalments were punctually paid the society must have stopped in a very short time indeed. The agreement between the parties was, and it is obvious that what they meant to agree was, that the £6,000 and the £5,000 odd in addition as the premium shall be a *debitum in presenti* payable by instalments if the instalments are punctually paid, but if there be a default in paying them, then all is to be paid at once. That being the contract between the parties that is not the case of a penal sum. It is not necessary for the House probably to decide *that question, but if it were necessary to de- [706
cide it I should say that it was not a penalty, but an actual sum, like the case of a promissory note payable by instalments, the whole to become due if one of the instalments is not punctually paid. * * * *

*LORD WATSON: My Lords, I agree with the re- [708
sult at which your Lordships have arrived upon the various matters which have been discussed in the present appeal.

* * * *

*My Lords, it is a well-known and a very proper [709
rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of common law, I think the terms of Order xiv, would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.

My Lords, the only part of the case upon which I felt some difficulty during the discussion was that which related to the character of the mortgage bond; the contention, I mean, on the part of the appellant that the sum appearing to be due on the bond ought to be split into two, namely, a sum of £6,000 as representing capital money advanced, and the sole debt due *according to his contention, and [710
a smaller sum of £5,221 as representing interest or penalty, for it was put in both shapes.

Now, my Lords, whatever the law might have been, if the appellant could have shown that the substance of the transaction was as represented by him, it humbly appears

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to me that the contract to which he refers as supporting his contention does not support it. I think the substance of the transaction between the Mutual Society and the appellant was this: that in compliance with the rules of the society he undertook an obligation precisely such as those rules contemplated, an obligation to pay a sum of £11,221 as the price of, or consideration for, the interest which he was to take in return in the society. I think it was the plain intention of these contracting parties that that sum should be paid and received, and no other sum is stipulated to be paid under the bond. No doubt there is a postponement of payment in certain events; and the bond might be read either as a contract for payment by eighty instalments, payment being accelerated against the mortgagor in the event of his default, or it might be viewed as a contract for immediate payment, with a right and privilege to the mortgagor to postpone that payment by making regular quarterly payments of instalments, each equivalent to one-eightieth part of the capital sum to be paid. But, my Lords, whichever of these views be taken, I do not think it possible to bring that within the cases of penalty or to bring it within the rule that would entitle the appellant to relief in equity. It seems to me to be a plain case of contract to repay that capital sum, and there being no illegality in the contract, it does not appear to me that he is entitled to have it held to be penalty or to ask relief.

My Lords, I fully agree that the order which your Lordships propose as that which should be made by this House will entirely meet the justice of the case. I think, my Lords, that it is very satisfactory that your Lordships have been able to indicate an opinion upon points which it is not necessary to decide in this case, because these taken along with the admissions which have been made at the bar will narrow to a very great extent the discussion upon the merits of the case, and that is exceedingly desirable, as otherwise the sole result of your Lordships' judgment would be 711] *to find that, after all the litigation which has taken place, the appellant is entitled now to begin litigation anew.

Order appealed from reversed. Cause remitted to the High Court with the Declarations and Directions already read to the House.

The following Order was afterwards entered on the Journals:—

It is *Ordered and Adjudged*, That the said Order of Her Majesty's Court of Appeal, of 21st of No-

vember, 1878, complained of in the said appeal, be and the same is hereby reversed : And it appearing to this House that the motion by way of appeal before the Common Pleas Division of Her Majesty's High Court of Justice on the 2d day of November, 1878, was, by consent of the parties, treated as an appeal from the order of Mr. Justice Field, dated the 30th day of October, 1878, as well as from the order of Mr. Justice Manisty, dated the 6th day of September, 1878, it is *Declared*, That the application of the appellant to Mr. Justice Field to enlarge the time for appealing against the order of Mr. Justice Manisty ought to have been granted ; and that such time ought now to be treated as having been enlarged till the 2d day of November, 1878, when the motion by way of appeal to the Divisional Court was made : And it is *Declared*, That the order of Mr. Justice Manisty, dated the 6th day of September, 1878, ought to have been discharged by the Divisional Court, and that the appellant ought to have been allowed to defend the action without making any payment into court or giving security to the satisfaction of the Master, but only for the purpose of having the amount due to the respondents under the several mortgage bonds on which the action was brought properly ascertained by an account to be taken *under the [712 direction of the court ; and that, if judgment were signed, it ought to have been as security only for what might be found due on taking such account : And it is *Ordered*, That the Common Pleas Division of Her Majesty's High Court of Justice do direct such account to be taken : And it is *Declared*, That in taking such account credit ought to be given to the appellant for all sums received by the respondents, or which, without their wilful default, ought to have been received by them under the said mortgage bonds, or from any of the securities comprised therein ; and the appellant and respondents respectively consenting thereto : It is hereby *Directed*, That the sum of £1,300, levied under the execution issued, be paid by the respondents into court to abide the result of the said account ; and, by the like consent, it is *Declared*, That in taking the said ac-

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count credit is to be given as on this day to the appellant for the sum of £2,000 as the value of the land forming part of the security under the mortgage bond bearing date the 25th day of March, 1874, which land is to be taken over by the respondents' society absolutely at that price, the appellant undertaking to forego all right to redeem such land, and to execute all necessary assurances to confirm the respondents' title to the same, and the respondents undertaking to pay to the appellant in cash and not by way of dividend any sum which, on taking the said account, may be found due to them, to an amount not exceeding the said sum of £2,000; and, by the like consent, it is *Ordered*, That any other securities comprised in the said mortgage bonds which may not hitherto have been realized be got in and converted into money, under the direction of the court, and the proceeds thereof applied in payment *of what, if anything, may be found due to the respondents on taking the said account, or otherwise, as may be just: And it is *Declared*, That the judgment signed and the execution issued in the action ought to stand as a security only for such ultimate balance, if any, as may be found due to the respondents upon the result of the said account: And it is *Declared*, That the costs in this House, and in the courts below, including the costs of the said petition presented by the appellant to this House on the 23d day of February last, praying that certain statements in the printed case of the respondents might be expunged therefrom, ought to abide the result of taking the account, and that such costs be paid by the respondents to the appellant if the balance found to be due at the time of the execution issued shall fall short of the sum indorsed on the writ as that directed to be levied and paid by the appellant to the respondents, if such balance at the time last aforesaid shall be found to have amounted to or to have exceeded that sum: And it is *Ordered*, That the amount of the costs incurred in this House in respect of the said appeal, and of the said petition of the appellant to expunge certain statements in the respondents' printed case, be certified by the clerk of the Par-

liaments: And it is farther *Ordered*, That the cause be, and the same is hereby remitted to the Common Pleas Division of Her Majesty's High Court of Justice to do therein as shall be just and consistent with these declarations, directions, and judgment.

Lords' Journals, 8th June, 1880.

Solicitors for appellant: *Purkis & Perry*.

Solicitors for respondents: *Linklater, Hackwood, Addison & Brown*.

Where a bond or mortgage payable in instalments contains a provision that in case of default upon any instalment the whole sum shall, at the option of the holder, become due, equity will not in the absence of fraud, trick or oppression, relieve the obligor from the effect of such default: 25 Eng. Rep., 221 note.

Otherwise when the payee is guilty of fraud, trickery or oppression: *Judd v. Ensign*, 6 Barb., 258.

It is the duty of the debtor to seek the creditor and tender to him if within the State: *Hoag v. Parr*, 13 Hun, 95, 99; *Grussy v. Snyder*, 55 How. Pr., 188, affirming 50 id., 134; *Hale v. Patton*, 66 N. Y., 238.

If the creditor be intentionally or evasively absent from his house, tender to his family there is good: *Judd v. Ensign*, 6 Barb., 258; *Hoag v. Parr*, 13 Hun, 95, 100; *Grussy v. Snyder*, 55 How. Pr., 188, affirming 50 id., 134.

In an action upon a bond which authorizes the obligee, at his election, to consider the principal as due on failure to pay the interest, the complaint must contain an allegation that he so elects, or he can only recover the interest: *Howard v. Farley*, 3 Rob., 599.

A mortgage contained a clause to the effect, that if any of the instalments of principal or interest should remain unpaid for ninety days after it became due, the whole amount of the note should become due immediately at the option of the payee or holder.

Upon a failure to pay any of the instalments of the note according to its

terms, the note became due immediately at the option of the payee, and it was not necessary for the payee, before commencing proceedings to enforce it for the full amount, to announce his option to the maker by notice in writing that he elected to consider the whole amount of the note as due; it was sufficient if he made his election and demanded payment of the whole amount before the commencement of the action: *Leonard v. Tyler*, 60 Cal., 299.

A company who, under a contract with a city, was constructing waterworks, executed a mortgage on them, to secure certain bonds and the coupons thereto attached, which stipulates that if the company shall fail, for the space of ninety days, to pay the coupons when they shall become due, provided such failure is not caused by the city under the contract, all of the bonds shall become due, and the lien of the mortgage may be enforced for the whole debt. Coupons remained due and unpaid for the specified period. Held, that the bill need not negative the failure of the city, but that such failure, if it existed, must be set up as matter of defence: *Waterworks Co. v. Barrett*, 103 U. S. R., 516.

A general allegation of fraud, without setting out the facts showing its existence, is bad, as merely alleging a conclusion of law without naming the existence of facts by which it is supported, and as presenting no fact upon which an issue can be taken: *McMurray v. Gifford*, 5 How. Pr., 14; *Barber v. Morgan*, 51 Barb., 116.

[5 Appeal Cases, 714.]

H.L. (E.), July 5, 6, 8, 1880.

[HOUSE OF LORDS.]

714] *HENRY PEARKS, *Appellant*; and WILLIAM MOSELEY and Others, *Respondents*.

(*In re* MOSELEY'S TRUSTS.)

Will—Bequest to a class—Remoteness.

In ascertaining whether a bequest falls within the rule against remoteness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule.

The vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members.

Per THE LORD CHANCELLOR (Lord Selborne): In a devise to a class, if all the shares would necessarily be ascertained within due limits of time, it would be immaterial that in a later part of the will there were found, as to some particular shares, superadded conditions which might or might not be void by reason of remoteness.

A will contained a bequest of a particular sum of £3,000 to the testator's daughter and her husband for life, and after their deaths "my will is that the sum of £3,000, the securities for the same and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." A life interest in another sum of £3,000 was given to the son with exactly the same trusts for his issue; in default, over.

Held, that the bequest was void for remoteness.

Held, also, that the bequest being to a class, the parts of it could not be severed, so as to treat one portion as good, though the other was void.

Hale v. Hale (1) approved.

APPEAL against a decision of the Court of Appeal, which had affirmed a previous decision of the Master of the Rolls (*).

Joseph Moseley, by a will dated in April, 1831, bequeathed his personal estate to trustees to convert the same into money, and to hold the produce upon trust as to the sum of 715] £3,000, part thereof, *to pay the income to his daughter Mary Jordan for her life for her own separate use and benefit, free from the interference or engagements of her then or any future husband. And as to the disposition of this sum after her husband's death and her own, the trust was declared in the following words: "And from the decease of my said daughter my will is that the sum of £3,000, the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter

(1) 3 Ch. D., 643; 18 Eng. R., 739.

(*) 11 Ch. D., 555; 27 Eng. R., 774.

who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease, or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living."

The will then proceeded to give to the testator's son William Moseley the interest of the other £3,000, part of the said money so directed to be invested, for his life. "And from his decease I declare and direct that the said sum of £3,000, or the aforesaid trust securities thereof and their produce, shall be upon the like trusts for his children and issue, as are hereinbefore declared of the trust money and fund for the benefit of the children of my daughter Mary Jordan, and in default of such issue of my son William, then in trust for my grandson Samuel Moseley, his executors and administrators." And, after certain legacies, &c., the residue of the personal estate was bequeathed to the same grandson.

The testator died in May, 1831. The will was proved in August of the same year, and the two sums of £3,000 were duly raised out of the testator's estate. The testator's son, William Moseley, married and had three children, two of them died young and without having been married, and the third, a daughter, Harriet, came of age in 1859, and on the 14th of April, 1863, married Henry Pears. On their marriage a settlement was executed giving them a joint power of appointment over the fund, subject to which it was to be for the separate use of Harriet for life, and after her death for her husband. This power of appointment was never exercised. Mary Jordan had several children, some of whom died unmarried, five of *them attained twenty-one in [716 her lifetime, two of these died, and the remaining three survived her. In December, 1870, the three children of Mary Jordan who survived her and the representatives of her two children who died in her lifetime presented a petition praying for payment of the legacy of £3,000 to them. The petition was served on Harriet Moseley who was the representative of the residuary legatee. In January, 1871, the petition was heard by Vice-Chancellor Malins, who held that the gift was not void as infringing the rule against perpetuities, and he therefore made an order in accordance with

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Pears v. Moseley.

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the prayer of the petition (*). The testator's son, William Moseley, died in September, 1877. The money was paid into the Bank of England on the 1st of December, 1877, under the provisions of the Trustees' Relief Act. On the 14th of December, 1877, Harriet Moseley, the representative of the residuary legatee, presented a petition praying for payment to her of the sum so paid into court. In the same month Henry Pearks presented a petition that the money might be paid out to him. Both petitions came on to be heard by the Master of the Rolls, who, thinking on the authorities the bequest to be void, ordered the money to be paid to Harriet Moseley as the legal personal representative of Samuel Moseley, the testator's grandson, the residuary legatee (*). Mr. Pearks appealed against this decision, which was affirmed by the Lords Justices, who held (following, though with avowed reluctance, *Smith v. Smith* (*)), that the gift to the children could not be severed from the gift to the remoter issue, but that the whole gift was void as infringing the rule against perpetuities (*). This appeal was then brought.

Mr. Chitty, Q.C., and Mr. W. Barber (Mr. Romer was with them), for the appellant: The gift of the £3,000 in favor of the children of W. Moseley was not a gift to the children and the issue as one undivided and indivisible class; there were two gifts, which might be severed, and one part remain good, though the other might not be capable of being sustained. The class of the children was ascertainable at the death of William Moseley the tenant for life. Their 717] interests *then became absolutely vested. Harriet, his only child (who married Henry Pearks), then took an absolute vested interest in the £3,000, and that interest was not affected by the subsequent provisions in the will. Those provisions which related to the after-born issue might be separated from the original gift to the children: *Catlin v. Brown* (*). Mrs. Pearks' interest being vested and indefeasible was taken after her, in succession to her. The rule supposed to be established by *Smith v. Smith* (*), which would make the whole gift void, because one part (which could easily be separated from the rest) was so, was itself erroneous, and had not met with the approbation of all subsequent judges. Even those who felt themselves bound to follow it expressed, as the Lords Justices had done in this case itself (*), their non-concurrence with it. The whole ten-

(1) *Law Rep.*, 11 Eq. 499.

(1) 11 Ch. D., 558; 27 Eng. R., 774.

(2) 11 Ch. D., 555; 27 Eng. R., 774.

(2) 11 Hare, 372.

(3) *Law Rep.*, 3 Ch. App., 342.

(3) *Law Rep.*, 3 Ch. Ap., 342.

(4) 11 Ch. D., 558-559; 27 Eng. R., 774.

dency of the reasoning of Mr. Baron Rolfe, in the opinion given by him as one of the consulted judges to the House of Lords, in the case of *Dungannon v. Smith* ⁽¹⁾, was unfavorable to the doctrine now asserted to be established by *Smith v. Smith* ⁽²⁾, although in the case in which he was speaking, the words of that particular devise were in violation of the law against perpetuities. And the doctrine stated in *Smith v. Smith* ⁽³⁾ was certainly not in accordance with that declared in *Catlin v. Brown* ⁽⁴⁾. The judgment there was expressly approved by the late Master of the Rolls in *Webster v. Boddington* ⁽⁵⁾, his decision in which proceeded on another ground. Nor was the doctrine now contended for approved in *Salmon v. Salmon* ⁽⁶⁾. In *Wilson v. Wilson* ⁽⁷⁾ there was a gift by will to the present and future children of J. L. who should be living at the decease of the testator's wife, with a direction that the shares of the daughters should be settled on themselves for life with remainders to their children, and it was held that the gift was not void for remoteness as regarded the share of a daughter born in the testator's lifetime, the bequest being treated as a separate gift to each child, which absolutely vested in each within due limits of time, and which was not affected by any condition afterwards provided.

*Effect ought to be given to what is the plain intention of the testator, in preference to a very strict application of the rule against remoteness, by which that intention must be entirely defeated.

Mr. Waller, Q.C., and Mr. Davey, Q.C. (Mr. Rawlinson was with them), for the respondents, insisted that the rule as to perpetuities, and as to the impossibility of separating, in a gift to a class, one portion from another, which had received its final exposition in *Smith v. Smith* ⁽⁸⁾, had been well established by previous authorities: *Jee v. Audley* ⁽⁹⁾; *Leake v. Robinson* ⁽¹⁰⁾; *Greenwood v. Roberts* ⁽¹¹⁾; *Webster v. Boddington* ⁽¹²⁾; *Hale v. Hale* ⁽¹³⁾; and whatever opinions might exist as to the soundness of the reasons for the rule, it was too well settled to be now called in question. In the earliest edition of Jarman on Wills it had been recognized as even then being a settled rule ⁽¹⁴⁾, that learned writer using these words with regard to it, "It is to be observed that where a gift to a class extends to objects too remote, the fact that some of the objects eventually comprising the class

⁽¹⁾ 12 Cl. & F., at p. 574.

⁽²⁾ Law Rep., 5 Ch. Ap., 342.

⁽³⁾ 11 Hare, 372.

⁽⁴⁾ 26 Beav., at p. 137.

⁽⁵⁾ 29 Beav., 27.

⁽⁶⁾ 28 L. J. (Ch.), 95.

⁽⁷⁾ 1 Cox, 824.

⁽⁸⁾ 2 Mer., 363.

⁽⁹⁾ 15 Beav., 92; 21 L. J. (Ch.), 262.

⁽¹⁰⁾ 26 Beav., 128.

⁽¹¹⁾ 8 Ch. D., 643; 18 Eng. R., 739.

⁽¹²⁾ Vol. i, p. 231.

were actually born within the period allowed by the rule of law, will not render the gift valid *quoad* those objects" (1): and in another place he says (2), "The fact that the gift might have included objects too remote, is fatal to its validity." *Seaman v. Ward* (3) declared that where there is a gift to a class some of the objects of which are too remote, and some not, effect cannot be given to the latter separated from the former, but the whole gift is void.

Mr. *Glasse*, Q.C., and Mr. *Darley*, appeared for other parties interested, but did not address the House.

Mr. *Chitty* replied.

THE LORD CHANCELLOR (Lord Selborne): My Lords, this case raises a question which, speaking for myself, I am surprised to find raised at this time upon the law of remoteness. *As I regard the case, the question so raised is one which has been long since conclusively determined by authority, and the arguments, by which it is attempted to distinguish this case from the former authorities, do not appear to me to be capable of being maintained.

The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law.

So understanding the rule, the first question in every case of this kind is that of pure and simple construction—what is the meaning of the words which the testator has used? What would their effect be, if there was no law of remoteness? So approaching the present will, I cannot avoid coming to the conclusion, that the words upon which everything turns, ("which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue living at his, her, or their decease or deceases respectively,") are words of description, and not words of superadded condi-

(1) Vol. i, p. 231.

(2) At p. 233.

(3) 22 Beav., 591.

tion. If you could find in this will a gift simply to "all the children of" the testator's "daughter who shall attain the age of twenty-one years" (I am reading that gift to which the present is referential), "and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases"—if you could find a gift in those terms, unqualified by anything which afterwards follows, no doubt there would be no remoteness. All the shares would necessarily be ascertained within due limits of time; and it would be immaterial, if in *a later part of the will you found, as to some particular share or shares, superadded conditions which might or might not be void, by reason of remoteness or otherwise. But in this case, if there was no law of remoteness, I am satisfied that no court would be justified in omitting the qualification which follows, or refusing to treat that qualification as entering into the description of the issue who are to take; "which issue shall afterwards attain the age of twenty-one years," and so on. It is, to my mind, the same thing in effect as if the testator had expressed himself thus: "For all the children of my said daughter who shall attain the age of twenty-one years, and the issue who shall live to attain that age of such of them as shall die in minority." If that were so, there can be no question that the gift to the issue would be void for remoteness; and then arises the ulterior question, whether it is possible to sever the gift to that issue from the gift to the children, so as to enable the one to stand, while the other must fall.

My Lords, I find that the Master of the Rolls, in the case of *Hale v. Hale* (¹), expressed an opinion upon the construction of this very will, with which I agree. He says (²): "As I read the gift, it was the issue which should afterwards attain the age of twenty-one years. That was a part of the description of the issue, and therefore it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue. There is no gift to the issue as such—only to such as attain twenty-one." And he points out that Vice-Chancellor Malins in the case of *Moseley's Trusts* (³), which has been so frequently mentioned in the argument, made that mistake in the reasons which he gave for his decision. It does appear to me, though there may be some expressions in Vice-Chancellor Malins's judgment in the case of *Moseley's Trusts* (⁴) which may perhaps go farther, that the view

(¹) 3 Ch. D., 638; 18 Eng. R., 739. (²) 3 Ch. D., at p. 649; 18 Eng. R., 740.

(³) Law Rep., 11 Eq., 499.

which is most calculated to reconcile all parts of that judgment is, that he thought you could properly treat the whole class as necessarily ascertained within twenty-one years from the death of the testator, and the ulterior condition, that the issue should attain twenty-one, as something superadded, 721] and not forming part *of the description of the issue. If so, I cannot agree with that view of Vice-Chancellor Malins; I am obliged to agree with the view of the Master of the Rolls.

Some other cases, one of which was before Vice-Chancellor Knight Bruce, *Riley v. Garnett* (1), and another more recent case before the present Master of the Rolls, *Muskett v. Eaton* (2), were referred to; in which, under words of apparent contingency more or less like this, it was nevertheless held, that real estate, given in remainder, vested in the whole class of children or issue, subject to be divested if they should not fulfil that condition. I consider that whole class of cases, which is very well known, to be inapplicable to the construction of gifts of personal property, such as you have to deal with here. There are some peculiar rules of law applicable to limitations of real estate; one of which is, that a contingent remainder must take effect at the time of the termination of a previous freehold estate, or not at all, unless it is supported by a fee vested in trustees; and in order to avoid the manifest disappointment of the intention of testators, and the destruction of a whole series of limitations which might result from that rule, the courts have in some cases leant to what I may describe as a rather violent and unnatural construction of words of contingency of this kind, and have treated them as descriptive, not of a condition upon which the property was to vest, but of a condition subsequent, on non-fulfilment of which it was to become divested.

In *Riley v. Garnett* (1), Vice-Chancellor Knight Bruce referred to the class of authorities on which he was proceeding; mentioning one of them, *Doe v. Nowell* (3). The report of *Doe v. Nowell* (4) refers to the earlier authorities, beginning with *Boraston's Case* (5), and including *Edwards v. Hammond* (6), *Bromfield v. Crowder* (7), and others, extremely familiar to all persons conversant with the law of real property. The rule of construction adopted in those authorities depends partly upon the law as to contingent remainders, and partly upon the principle, that, as to real estate, the

(1) 3 De G. & S., 629.

(2) 1 Ch. D., 435; 15 Eng. R., 840.

(3) 1 M. & S., 327.

(4) 3 Co., 19.

(5) 3 Lev., 132.

(6) 1 B. & P. (N.R.), 313.

courts are always unwilling to hold the fee to be in abeyance. *None of these considerations properly applies [722 here; and I am not aware that they have ever been applied, to gifts of personal estate. Therefore, in point of construction, I come to the conclusion that these words which raise the question are words of description; that they describe the issue who are to take; and that there is no gift to any issue who do not fulfil those descriptions.

My Lords, that introduces the other question, which was principally argued by the counsel for the appellant; whether (as Vice-Chancellor Malins put it in a passage of his judgment in *Re Moseley's Trusts* (')), which really points out what is the true question to be determined), you can or cannot sever the shares, whether you can, within proper limits of time, ascertain the whole number of the class—and which is the same thing as the whole number of shares—and whether it is, as he says later in the same page, “in effect a gift of a legacy to be divided into as many shares as there are children.” If that were so it would be good, because the children must necessarily be ascertained within due limits of time; and, as I said before, it would not signify what afterwards became of any particular share, any more than in the case of *Cattlin v. Brown* ('), to which reference was made. But, my Lords, the question is, are there here two classes, or is there one class compounded of persons answering one or other of two alternative descriptions? Can you or can you not ascertain the number of shares and of sharers within the necessary limits of time?

That question has always been investigated by looking to the state of things as it was at the testator's death; and if, at that time, the whole might be too remote, then you could not rectify it, by looking to the way in which the events actually turned out at any later time. The gift in this case is to all the children of William Moseley who should attain the age of twenty-one years, and the lawful issue who should attain twenty-one years (taking *per stirpes*) of such of them as should die under that age. At the death of the testator William Moseley was unmarried. The testator died in May, 1831, and William Moseley married in November of the same year. It was at that time absolutely uncertain, whether he would ever have any child who might live to *attain the age of twenty-one years. The whole class [723 might have consisted of remoter issue, who might not attain the age of twenty-one within twenty-one years from the death of William Moseley. Not only could you not know,

(') Law Rep., 11 Eq., 499.

(') 11 Hare, 372.

with certainty who might be the particular members of the class, and say they must come into existence within the necessary limits of time; you could not then ascertain so much even as a minimum share to which any particular members or member of that class must, at all events, be entitled. It was uncertain whether the whole class might not eventually consist of those who would be directly affected by the vice of remoteness. How can you possibly say that there were any shares which would necessarily be ascertained, under these circumstances, within due limits of time? Still more, how could you tell how many such shares there would be?

The argument which has been offered is really this, that where a class is so defined, that certain members of it, if they come into existence at all, and if they fulfil the required conditions, must come into existence and fulfil those conditions within due limits of time, then those persons, if there was no law of remoteness, would on fulfilling those conditions within those limits of time, be entitled to a share, of which you could not, indeed, tell what the full amount would be till all the other shares were ascertained, but which at all events never could be less than a certain sum. That, my Lords, is true: but the conclusion sought to be founded upon it, that you can therefore sever such shares from others which may not be capable of being ascertained within the same limits of time, seems to me not to follow. A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members.

That was really the point decided in the case of *Leake v. Robinson* ⁽¹⁾, because there I think four members of the class were born before the death of the testator, as to some, if not all, of whom it is manifest upon the report, that, as [724] things stood at the time when the testator died, they must necessarily have attained the age of twenty-five years (which was the condition)—if they lived to attain it at all—within twenty-one years from the death of the testator. It was strongly argued that they ought to be severed from the rest; and, in fact, the very same argument which has been addressed to your Lordships in this case would have been equally applicable to that; because it could make no differ-

(1) 2 Mer., 363.

ence in principle, that they stood in the same degree of relationship to the testator, and were all the children of one father and mother.

What Sir William Grant said about that argument, and the way in which he disposed of it, was this⁽¹⁾: "To induce the court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes, and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals or (what he had as little in his contemplation) distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."

Mutatis mutandis, that passage appears to me to be applicable here; because it can make no difference, in principle, that here, the class being *per stirpes*, some of the *stirpes* are represented by issue of one generation, and others of the *stirpes* are represented by issue of another generation. The rule as to vesting must be exactly the same, which would have been applicable if the gift had been in this form: "in trust for all the children of my said daughter who shall attain the age of twenty-one years, or die under that age leaving issue who shall afterwards attain the age of twenty-one." In that case the children, and the children only, would have taken; that is to say, if there had been no law of remoteness, the children who were dead would have taken transmissible *interests, depending [725 upon the attainment of twenty-one by issue whom they might leave surviving them; interests which would have been part of the personal estate of the parent, and would not have gone to the issue. As far as the principle of class is concerned, it makes no difference whether the gift might be in that form, in which beyond all controversy it would have been void, or in the form in which you find it here, where the parent is to be represented by the issue, and grandchildren substituted for children—substituted, that is to say, as original takers taking original shares, and not in the sense, which is extremely different, of persons taking by

(¹) 2 Mer., at p. 390.

way of gift something which had previously vested in their parent, and afterwards had been divested.

I forbear from going farther into the matter, for this reason; that the whole question raised upon this will has been carefully and elaborately considered and examined by the Master of the Rolls in the case of *Hale v. Hale* (*). With every part of that judgment I agree; and that judgment anticipates the entire argument which has been used here. He says (*): "The class you could ascertain in one sense; you could say that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say, at the testator's decease, that in no case could the whole class exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four" (that was the age in the case of *Hale v. Hale* (')) "after the legal period; and then that share ought to come back to the others if you could divide it; but if you could not, it must remain absolutely uncertain what share each child would take until it was ascertained whether the grandchildren attained twenty-four or not." "The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each [726] child must at least have a *certain share. That being the state of the law, could you sever the shares? That is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There again you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more." The testator's death of course was a much more favorable period for that argument than what we have to deal with here. Then he goes on: "As I understand it, *Leake v. Robinson* (*), and the whole of that class

(*) 3 Ch. D., 643; 18 Eng. R., 739.

(*) 3 Ch. D., at p. 646; 18 Eng. R., 742.

(*) 2 Mer., 363.

of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this court, which had held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every case on the subject." The Master of the Rolls refers to some of them.

I must own that I feel some degree of surprise, after that very careful and well reasoned judgment, that encouragement should have been given to the appellant to bring this question to your Lordships' bar. It may be that if *Jee v. Audley* (¹), *Leake v. Robinson* (²), and a long series of cases which have followed them, had never been decided, the courts might have reasonably wished, if they could, to find some means of modifying the application of the rule of remoteness, so as to preserve as much as possible of the intention of testators, and sacrifice only, if they could discover it, the real excess. But whatever one might have thought of the possibility of doing this, if the question had been entirely free from decision, it has been long since settled and determined; and I apprehend that now no authority less than that of the *Legislature can alter it. I must [727 therefore move your Lordships that this appeal be dismissed with costs.

LORD PENZANCE: My Lords, I confess that upon hearing this case opened and referring to the judgment which your Lordships are now asked to set aside, I felt considerable difficulty in coming hastily to any conclusion that the case of *Smith v. Smith* (³), to which reference was made, was one that ought to be examined with regard to the propriety of the reasoning contained in it; for, the Lords Justices in the judgment from which this appeal is made, although they felt themselves, as they said, bound by that case, threw out suggestions, in very unmistakable terms, that, but for that case, they would have been of a contrary opinion; and the great respect that I have for the Lords Justices induced me to look very vigilantly at that case of *Smith v. Smith* (³), under such circumstances, in order to see whether there was room for any reconsideration of the principles contained in that case with a view to their alteration.

(¹) 1 Cox, 324.

(²) Law Rep., 5 Ch. Ap., 342.

(³) 2 Mer., 363.

But, my Lords, on referring to the judgment of the Vice-Chancellor with which the Lords Justices said they entirely agreed, I find myself in great difficulty, because the Vice-Chancellor's judgment appears to me to have proceeded upon a supposition that the language of the will was different from what it really was. The learned Vice-Chancellor says "here the number of objects must be ascertained within twenty-one years after the death of the testator." "It is," he says, "*to the children who attain twenty-one and the issue of those who die under that age*; so that necessarily you ascertain the whole number of the class within a life in being and twenty-one years."

But, my Lords, it is not so. That is not the provision of the will. The provision of the will is to "the children of the daughter who shall attain the age of twenty-one years and the lawful issue of such of them as shall die under that age," . . . "which issue shall afterwards attain the age of twenty-one years." It is those words that, according to those who wish to hold this gift void, bring the case within 728] the operation of the law against perpetuities, *and the judgment of the Vice-Chancellor omitting those words altogether fails to meet the case which is here alleged against the gift.

Now, my Lords, that being the case, I thought it desirable to look a little into what is the principle upon which all previous cases have proceeded. We are asked to set aside the judgment, or at least to differ from the judgment, in *Smith v. Smith* (1); but as far as I can see your Lordships must not only do that, but you must differ from the principle contained in the case of *Hale v. Hale* (2), the principle contained in the case of *Bentinck v. The Duke of Portland* (3), and not only that but also in the case of *Leake v. Robinson* (4). I should have quoted to your Lordships the language of the Master of the Rolls, Sir William Grant, in *Leake v. Robinson* (5), but my noble and learned friend the Lord Chancellor has already done so, and I do not repeat it. It is quite plain, as it seems to me, from the language there used that the principle of *Leake v. Robinson* (6) directly applies to this case. My Lords, the Master of the Rolls in *Hale v. Hale* (7), dealing with that principle, says this: "A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being;" in other words, unless the objects

(1) Law Rep., 5 Ch. Ap., 342.

(2) 3 Ch. D., 643; 18 Eng. R., 739.

(3) 7 Ch. D., 693; 23 Eng. R., 820.

(4) 2 Mer., 363.

can necessarily be ascertained within the legal period. That I take it is a proposition which nobody disputes.

Upon that it is contended that where the gift is to a class that may consist of several members, and you can ascertain the maximum number of that class, you should hold valid the bequest to such members of that class as are within the period prescribed by the law against perpetuities, and invalid with regard to those who are without that period. That is a proposition which, as the Lord Chancellor has already said, is one that might very well have been debated a hundred years ago, and might be worthy of consideration now, if the question now were one of legislation; but in the present day, after all that has passed, after the decision in *Leake v. Robinson* (*) and all the cases that have followed it, it appears to me that that is a contention which would *be directly in the teeth of those cases, for it was [729 not only *Leake v. Robinson* (*) which enunciated that doctrine, but a case in your Lordships' House of *Dungannon v. Smith* (*) distinctly adopted it. It was there said that where a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, one embracing the lawful and the other the unlawful objects of his bounty. Therefore, your Lordships have a decision in your own House distinctly adopting the principle of *Leake v. Robinson* (*).

These being the principles on which the matter rests, then comes the question of the construction of this will. Now, under the will could the objects of the testator's bounty be ascertained within the life or lives in being, or within twenty-one years afterwards? The primary object of his bounty was William Moseley. Well, of course, he was ascertained. Then there are the children of William Moseley. William Moseley was the life in being, and when he died of course his children could be ascertained. Then there is another portion of the objects of his bounty—there are these children of the children who died under twenty-one—so many children of the children, or in other words, so many of the grandchildren, as should live to the age of twenty-one. It is impossible to say you could ascertain the number or the existence of such persons within the life of William Moseley, or of any other life in being, and twenty-one years afterwards. Therefore, supposing that the will received its natural construction, and the words upon which so much has been said, beginning within the words “which issue shall

(*) 2 Mer., 368.

(*) 12 Cl. & F., 546.

afterwards attain the age of twenty-one years," be considered part of the description, it is unquestionable that you could not ascertain of how many members that class would consist. If William Moseley had three children (which he had) you could ascertain that there never could be more than three shares, each child having one; but you could not ascertain, without going to a period beyond the period prescribed by law, how many of those children would leave children that would attain the age of twenty-one, themselves dying under twenty-one. Therefore I think it is unquestionable that although you might ascertain the minimum, you could not ascertain the actual share of the persons entitled under this description to the testator's bounty.

My Lords, that being so, the only question that remains (and indeed that seems to me the only question that exists in the case) is whether you can possibly so twist (I might almost say) the language the testator has used, as to consider that the first part of that bequest contained a description of the class, and that the words which follow, "which issue shall afterwards attain the age of twenty-one" were words of condition subsequent or of defeasance. That seems to me to be the only practical question and the only way in which any question could be raised upon this will, consistently with the decisions that have gone before.

Now it was very ably argued by Mr. Chitty that cases had existed in which words of this character have received a construction of that kind, but, as my noble and learned friend on the woolsack has pointed out, those cases were cases of a peculiar description. They were not cases applicable to personal property; they were not cases in any degree *in pari materia*, or of similar character with the present; and, above all, they were not cases in which this law of perpetuities came in question, in respect of which it has been laid down and taken as an axiom of interpretation, that you should construe the will first according to its natural meaning, without any regard to the effect which that meaning might have according to the law of perpetuities, and afterwards apply that law. Therefore, I do not think those cases are cases which your Lordships should adopt as a rule for construing this will.

But the case of *Festing v. Allen* (1), to which allusion has been made, is a very strong case to the opposite effect. There the words were not "which issue shall attain the age of twenty-one," but "who shall attain that age." Now I

(1) 12 M. & W., 279.

suggested in the course of the argument that whether the words "which issue shall attain" or "who shall attain" are used, the meaning cannot be different. It is impossible, I think, to suggest that there is any difference between the meaning which naturally flows from the use of the words "which issue," and the meaning which flows from the use of the word "who." They seem to me to be alternative expressions for the same idea. In *Festing v. Allen* (1) the word was "who," and there was a most distinct decision, after some consideration, pronounced by Baron Rolfe in the Court of Exchequer in that case, that the words "who shall afterwards attain the age of twenty-one years," formed part of the description.

It seems to me, therefore, my Lords, that whether you look at the construction of this will, as if no such question had arisen before, and construe the language according to its natural meaning, or whether you look at a case like *Festing v. Allen* (1), where the matter has been the subject of previous decision, your Lordships can arrive at no other conclusion than that the meaning of this clause in the will was, that a class should be created to consist, in the first place, of the children of William Moseley, and, in the second place, as part of the same class, of their children, if those children should attain the age of twenty-one years. That is the common sense meaning of the clause, and it is also a meaning consistent with the case to which I have just drawn attention.

I will only add that, as regards the judgment of the Vice-Chancellor in the present case, that judgment is in entire accordance with a previous judgment of his in the case of *Re Moseley's Trusts* (2), and that, on that case being cited before the present Master of the Rolls in *Hale v. Hale* (3), the Master of the Rolls dealt with the judgment of the Vice-Chancellor, as it appears to me, in a way with which I should have entirely agreed, and explained that that judgment could only have been arrived at, and was arrived at, by omitting the most material part of the will—I mean material in the sense of its creating the difficulty against which the appellant has now struggled.

Under these circumstances, I agree that the decision of the court below should be affirmed.

LORD BLACKBURN: My Lords, I am entirely of the same opinion.

This case comes in a peculiar manner before this House.

(1) 12 M. & W., 279.

(2) Law Rep., 11 Eq., 499.

(3) 3 Ch. D., 648; 18 Eng. R., 739.

1880

Pears v. Moseley.

H.L. (E.)

The Master of the Rolls, when he had it before him, said, and said correctly, that the case of *Smith v. Smith* (') was 732] precisely in *point, and, being a decision in the Court of Appeal, he must follow it. In the Court of Appeal the learned judges also said "the case of *Smith v. Smith* (') is precisely in point, and we are as much bound to follow it as the Master of the Rolls was;" but each individual judge in the Court of Appeal said that he did not agree with the reasoning of *Smith v. Smith* ('), but they did not enter into the details, or show us how or why they did not agree with that reasoning. That has occasioned to me, all through, the great embarrassment I have felt in this case, for I apprehend it is never safe to say that a man's opinion is wrong until you appreciate the arguments which have led him to that opinion; and up to this moment I am unable to find out what were the arguments which led the judges of appeal to say that they thought the decision in *Smith v. Smith* (') was wrong.

I could perfectly well understand that it might be said originally, if the thing were beginning *de novo*, that it operates at times very harshly, and in this particular case it does operate extremely harshly, that where part of a class are out of the limits of perpetuity, the whole interest of that class should be void, and that that one—in this case the only one who existed of that class, and who was not beyond the limits of perpetuity—is to take nothing—the whole being void. I perfectly understand that it could be said that that was a thing against which, although it was originally so determined, there was a great deal to be said, but there would also be a great deal to be said in its favor. But then I do not think that can be the ground upon which the Lords Justices of appeal went, because it certainly seems clear that that has, at least since the time of the decision of Lord Kenyon, or at all events since the decision of Sir William Grant, more than sixty years ago, been considered positive and settled law, and there has been no dispute at all about its being law; and now it is no more competent to your Lordships' House to say that you will reverse that long-established law than it was for the court below, the Court of Appeal, to do it.

But I do not think that it could have been upon that ground that the Court of Appeal went, for Lord Justice James refers to the reasoning of Vice-Chancellor Malins in 733] *Re Moseley's Trusts* ('), *and says that but for *Smith*

(') Law Rep., 5 Ch. Ap., 342.

(') Law Rep., 11 Eq., 499.

v. *Smith* (') "I should without any doubt or hesitation have concurred in that conclusion, and I rather think that the Master of the Rolls would have done so too."

Now, my Lords, the strange and peculiar thing there is, that when we look at the reasoning of the Vice-Chancellor in *Re Moseley's Trusts* ('), in which Lord Justice James supposes the Master of the Rolls would have concurred, we find that in *Hale v. Hale* (') the Master of the Rolls gave a long and elaborate judgment, the pith and object of which was to show that he did not agree with the reasoning of Vice-Chancellor Malins in *Re Moseley's Trusts* ('), and I confess myself, upon looking at the matter, I have been puzzled to make out what was the ground on which the Court of Appeal went.

However, my Lords, putting that aside, I at once agree with what my two noble and learned friends who have spoken before me, have said. It seems to me that in the first place, it is established by a long series of authorities, that if the gift be to a class some of whom are beyond the limits in the way of remoteness, the whole is void—I regret that it is so in this case, but I cannot help it—it is the rule. Secondly, I think it has been established by a long series of authorities that we are to construe the will just as if there was no such rule of law as that of perpetuity or remoteness, and see whether the gift is to a class, and afterwards ascertain whether the class is one, part of which is beyond the limits of remoteness. Construing it in that way I certainly do agree entirely with the Master of the Rolls in *Hale v. Hale* (') that Vice-Chancellor Malins does construe this will contrary to what I should have thought was the obvious construction, and does so entirely by ignoring,—in all he says at least,—he may have had them present to his own mind—I cannot tell that,—the words which occasion the whole difficulty and doubt.

Taking that view of the matter I do not think it is necessary to go farther into the question than to say that I quite agree with what the Master of the Rolls said in *Hale v. Hale* ('); and taking that to be the construction of the will, and taking the rule as I have previously said to be established by authority, the only *doubt I can entertain as to the propriety of affirming this decision, and as a consequence affirming the decision in *Smith v. Smith* ('), is, what I said at the beginning, that I am not at all sure that I appreciate the grounds on which persons of such learning

(') Law Rep., 5 Ch. Ap., 342.

(') Law Rep., 11 Eq., 499.

(*) 3 Ch. D., 643; 18 Eng. R., 739.

as the three Lords Justices of appeal thought that that reasoning was not satisfactory.

LORD WATSON: My Lords, at the conclusion of the argument at the bar, the main, I may say, the only, difficulty which I felt in this case arose from a suspicion that I had failed to appreciate the grounds of judgment assigned by the learned Vice-Chancellor, which received the warm approval, apparently, of the learned judges of the Court of Appeal. But I have been very much relieved by the observations which have fallen from your Lordships, and I am constrained to believe that the error, if I may so call it, upon which that judgment of the Vice-Chancellor is based, arises, I will not say from his ignoring these very important words in Joseph Moseley's bequest "which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue at his, her, or their decease or deceases respectively," but at all events from his having failed to give their due and proper effect to these words.

My Lords, I am quite satisfied that according to the just construction of this will, the words must be read as part of the description in which they are imbedded, and that they do aptly express this qualification that no grandchild of the testator shall take who does not attain the age of twenty-one, or who dies before that period not leaving surviving issue of his body.

Now, that being the right construction of the will, as your Lordships have also held, I think that the legal principles applicable to the case are in themselves very clear, and not only so, but that they are principles established by a long, weighty, and consistent series of authorities.

My Lords, it would be a waste of the time of this House were I, after the full exposition of the law which has been given by your Lordships, to make any comment upon those 735] cases. Therefore *I content myself with saying that I concur with your Lordships' views both as to the construction of this will and also as to the principles of law which must govern the case.

Mr. Chitty: Before your Lordship puts the question, may I remind your Lordships that the parties agreed, as I stated in opening the case, that the costs in any event should come out of the fund.

THE LORD CHANCELLOR: I had recalled that to mind, and purposed saying that under those circumstances the

House will not make the usual order as to costs. The costs will come out of the estate.

Mr. *Chitty*: Yes; the costs of both parties will come out of the fund, and they will be costs as between solicitor and client.

Judgment under appeal affirmed; and appeal dismissed; the costs to be provided for as agreed between the parties.

Lords' Journals, July 8, 1880.

Solicitor for appellant: *Robert Wood*.

Solicitors for respondents: *Crosse, Sons & Riley*.

[5 Appeal Cases, 754.]

H.L. (Sc.), June 14, 1880.

[HOUSE OF LORDS.]

*STEELE and Others, *Appellants*; M'KINLAY, [754
Respondent.

Bill of Exchange—Acceptance—Indorsement—Collateral Obligation—Statutes 19 & 20 Vict. c. 60, ss. 6, 11; 19 & 20 Vict. c. 97, s. 6; and 41 Vict. c. 13, s. 1.

Sect. 11 of the Mercantile Law Amendment (Scotland) Act, 1856, is in the same terms with sect. 6 of the corresponding English Act; and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorized by him."

On the 2d of March, 1878, in *Hindhaugh v. Blakey* (8 C. P. D., 136), it was held that an acceptance by the drawee was null in respect that there was no writing except the signature.

On the 16th of April, 1878, was passed the Bills of Exchange Act, which, after reciting the above quoted section of the Mercantile Law Amendment Acts; and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not, and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consist merely of the signature of the drawee written on such bill."

A. procured from B. an advance of £1,000 on a bill of exchange at twelve months for C. and D., his two sons. B. signed the bill as drawer, and addressing it to C. and D., handed it to A., who forwarded it to C. and D. They signed it as acceptors, and sent it back to A., who wrote his own name across the back, and gave it to B. He then forwarded the amount to C. and D.

Subsequently C. and D. became bankrupt, and were unable to pay the amount of the bill. A. and B. being both dead, there was no exact evidence why A. put his name on the bill. C. and D. had previous to the date of the bill obtained money from B. on their own security. The trustees of B. claimed from A.'s representative the amount of the bill on the ground that A. indorsed the bill as "joint obligant" with C. and D., "and as co-acceptor with them for payment of its contents":

Held, affirming the decision of the court below, although not upon the same reasons, that A.'s representative was not liable, because that A. was not an acceptor within the meaning of 19 & 20 Vict. c. 60, s. 11, or otherwise, in any true and proper sense of the word; and that his liability, as insisted upon by B.'s trustees, could only be established by proof of a special contract to be answerable to the drawer for the

acceptors, which contract, being different from that which the law-merchant would infer from his mere signature as it appears on the back of the bill, could only be proved by a writing properly signed under, in Scotland, the 6th section of 19 & 20 [755] Vict. *c. 60; and in England the 29 Car. 2, c. 8, s. 4, which writing was here absent.

Held, also, that the act of 1878 was in effect a declaration by the Legislature that the decision in the case of *Hindhaugh v. Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish act between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded.

Per LORD WATSON: The character in which A. did become a party to the bill was both in fact and law that of an indorser; and in determining his legal position, the fact that his indorsement was written before the bill was delivered to the drawer, and the money advanced by him, was quite immaterial.

The doctrine deduced from *Don v. Watt* (26 May, 1812, F. C., vol. xvi, 647), and *Walters*, (7 March, 1818, F. C., vol. xix, 489), by Professor Bell in his Commentaries, vol. i (7th ed.), p. 425, that in Scotland a signature as an acceptor by a person not a drawee "held to import a joint undertaking as acceptor of the bill or maker of the note" not approved of: see Lord Watson's opinion at p. 779.

Mathews v. Blossome, 1864 (88 L. J. (Q.B.), 209), doubted as sound law.

Macdonald v. Union Bank of Scotland (Court Sess. Cas., 3d Series, vol. ii, p. 963), approved.

APPEAL from the Court of Session, Scotland.

In 1874, William and Thomas M'Kinlay commenced business as timber merchants at Strabane, Ireland, under the name of W. & T. M'Kinlay. Requiring funds, they commissioned their father, the late James M'Kinlay, horse dealer in Glasgow, to obtain them an advance of £1,000. He entered into communication with John E. Walker, coach proprietor in Glasgow, the result being that Mr. Walker signed as drawer a bill bearing date the 25th of May, 1874, for £1,000 at twelve months, addressed to "Messrs. Wm. & Thos. M'Kinlay, wood merchants, Strabane," which he handed to James M'Kinlay. The latter sent it to his sons in Ireland, who returned it duly accepted in their firm's name. James M'Kinlay then wrote his own signature across the back of the bill, and handed it to Mr. Walker, who remitted its amount, less discount, to the drawees. In March, 1875, Mr. Walker discounted the bill with the National Bank of Scotland, but W. & T. M'Kinlay failing to pay it when due, he retired it.

James M'Kinlay died in September, 1874, and his representative is the respondent Alexander M'Kinlay. J. E. [756] Walker died in *September, 1875, and the appellants are his trustees. Several questions arose between the parties in Scotland, and there was an action and a counter-action, which were heard together. But the sole question in this appeal was whether the appellants, the trustees, could recover from the respondent, as representing his

father, the sum of £1,000, the amount of the bill of exchange.

The bill of exchange was in the following form :

"Stamp 10s.

"Due 28th May, 1875.

"£1,000 stg.

"Glasgow, 25th May, 1874.

"Twelve months after date pay to me or my order at the National Bank of Scotland's office, Queen Street, Glasgow, the sum of one thousand pounds sterling, value received.

"John E. Walker,

"W. & T. M'Kinlay.

"To Messrs. William & Thomas M'Kinlay,

"Wood merchants, Strabane."

The bill was indorsed on back as follows :

"James M'Kinlay,

"John E. Walker."

Owing to the death of James M'Kinlay and J. E. Walker it was not known exactly for what purpose James M'Kinlay put his name on the back of the bill.

The appellants averred *inter alia* :

That James M'Kinlay had frequent business transactions with Mr. Walker, and had induced him during the year 1874 to make considerable advances to his sons William and Thomas M'Kinlay. . . .

(Cond. 3.) These advances amounted in all at the time of Mr. Walker's death, on the 2d of September, 1875, to £3,784 13s. 4d., exclusive of interest, and were, to the extent of £3,676 3s. 6d., constituted by six acceptances of W. & T. M'Kinlay to Walker.

(Cond. 4.) One of these bills was dated 25th May, 1874, and was drawn by Mr. Walker upon, and accepted by, W. & T. M'Kinlay for £1,000, and was payable twelve months after date. It was indorsed by James M'Kinlay. He so indorsed it as joint obligant with the acceptors, and co-acceptor with them for payment of its contents.

On the other hand, the respondent stated *inter alia* :

The late James M'Kinlay carried on a large business as a horse dealer in Glasgow, and he also, under the firm name of James M'Kinlay & Son, carried on the business of a timber merchant at Strabane, in the north of Ireland. These *businesses were entirely separate from each other. [757 The defender for many years before his father's death managed and conducted his Scotch business as a horse dealer, and the defender's brothers William and Thomas had the management of the Irish business.

(Stat. 2.) Some time before his death the defender's father transferred his business property and effects in Ireland to defender's brothers, W. & T. M'Kinlay; and the Glasgow business and property to the defender, burdened with certain provisions, *inter alia* that of paying his debts.

(Stat. 4.) After they had acquired the Irish business the said W. & T. M'Kinlay made large additions to their works, and as they required an extra supply of money therefor, they arranged to get a loan of £1,000, and on the 25th day of May, 1874, they adhibited their names of the document founded on, which then contained the whole writing now on the face thereof, except the subscription "J. E. Walker," but contained no writing on the back. The said document was delivered by W. & T. M'Kinlay to their father James M'Kinlay for the purpose of his filling up as drawer, and advancing to them the said sum of £1,000. The said J. E. Walker was not known in the transaction to the said W. & T. M'Kinlay, and it was not until their father's death that they learned that the name of Mr. Walker had been inserted in the bill as drawer.

(Stat. 5.) The defender (respondent) is not aware, and cannot tell, how the name of James M'Kinlay came to be written on the back of the said document; and he does not admit, and does not believe that it was put there by him as acceptor.

(Stat. 6.) The said W. & T. M'Kinlay, were afterwards requiring further advances, and in the end of the year 1874, when on a visit to Glasgow to make arrangements for obtaining more money, they learned for the first time that the name of Mr. Walker had been filled in on the said bill as drawer, and they entered into arrangements with Mr. Walker to get further advances, on condition of their giving him certain securities over their property in Ireland, covering the £1,000, and the other advances which might be made by him. The said securities consisted of a mortgage over certain of the property and effects in Ireland belonging to the said W. & T. M'Kinlay.

(Stat. 7.) The mortgage is dated the 3d of February, 1875, and it is therein stipulated "that whereas Mr. Walker had agreed to lend to the said firm of W. & T. M'Kinlay the sum of £5,000, on having the repayment thereof secured to him in manner" therein mentioned, and that in pursuance of the said agreement, and in consideration of the receipt of the said £5,000, which is hereby acknowledged, and of the other considerations therein mentioned, and, *inter alia*, the delay mentioned in stat. 8, the said W. & T. M'Kinlay

granted the said mortgage, and demised the subjects therein mentioned to Mr. Walker. The £1,000 is included in the said £5,000.

(Stat. 8.) By the mortgage W. & T. M'Kinlay bound themselves that, on the 3d of May, 1875, they should pay to Mr. Walker the sum of £5,000 with interest, and if the said sum of £5,000 should not be paid to them, that they by half-yearly payments on the 3d of August and the 3d of February in every year should pay interest on the sum, or so much thereof as still remained owing. If default was made in the said payment it was therein provided that the said J. E. Walker should have power to enter into possession and draw the rents and sell the subjects mortgaged. . . .

*(Stat. 9.) Before the date of the document [758 founded on, Mr. Walker had made further advances to the said W. & T. M'Kinlay amounting to £2,672, or thereby, in addition to the £1,000. By Mr. Walker accepting the mortgage under the circumstances, there was effected a novation of the said debt of £1,000, if any debt was constituted by the document containing it, and any liability attaching to the defender was discharged.

(Stat. 11.) The said J. E. Walker died in September, 1875, but previous to his death he gave no notice requiring payment in terms of the said mortgage, and the pursuers did not give any such notice until the 11th of October, 1876. . .

(Stat. 12.) On the 28th of May, 1875, Mr. Walker, both through his clerk and his agents, and by means of his brothers, endeavored to get from the defender a separate acknowledgment for the said £1,000, but the defender refused to grant the same, as he did not consider himself liable therefor; but he admitted both verbally and in writing that he undertook to pay his father's debts so far as they referred to the Scotch business.

In the proof allowed, William M'Kinlay said that his firm intended to obtain money on the security of a mortgage, his father promising to arrange the loan. The bill he signed as a preliminary transaction. His father got the bill, but it was not intended that he should be liable for it. Mr. Walker's book-keeper, Mr. Black, said he drew out the bill on Mr. Walker's instructions, but never saw James M'Kinlay in connection with it. He saw Mr. James M'Kinlay's signature on the bill about six weeks before it became due. Nor did Mr. James M'Kinlay's name appear in Mr. Walker's account books until after the bill was due.

George Steele, one of the appellants, stated that Mr.

Walker told him that James M'Kinlay was to sign a bill for £1,000 along with his sons, William and Thomas, as a security for them; and that afterwards, at an auction on the 26th of May, 1874, he (witness) saw James M'Kinlay take what he supposed to be a bill out of his pocket and give it to Mr. Walker; and shortly afterwards, on the same day, in the Waverley Hotel, Glasgow, Mr. Walker met the witness and said to him, "Do you know what James M'Kinlay was doing there?" He (the witness) said "He was giving you a bill." "Yes," he said, and he took it out of his pocket. "This is the bill, it is all right; it is signed by the old man," meaning James M'Kinlay.

By the account rendered to W. and T. M'Kinlay it appeared that Mr. Walker had advanced to them, on the 12th of May, 1874, £300, without the intervention of the father, James M'Kinlay, and other sums, amounting to about £1,600.

759] *The Lord Ordinary (i), on the 7th of June, 1878, pronounced an interlocutor, in which he found, *inter alia*, that the appellants, the trustees of J. E. Walker, were entitled to recover from the respondent, Alexander M'Kinlay, son of the deceased James M'Kinlay, the sum of £1,000, contained in the bill libelled.

The respondent reclaimed to the First Division, who, after hearing counsel, ordered the case to be tried before the judges of both divisions.

On the 1st of July, 1879, the majority of seven judges held that James M'Kinlay's signature constituted no liability against him, and therefore none against the respondent. The judges in the minority were Lord Gifford and Lord Shand, and the judges in the majority, the Lord President (i), the Lord Justice Clerk (i), Lord Deas, Lord Ormisdale, and Lord Mure. The majority were of opinion, (a), that James M'Kinlay, though not a drawee, must be regarded as an acceptor of the bill; and, (b), that his signature did not constitute a valid acceptance, because sect. 11 of the Mercantile Law Amendment (Scotland) Act requires, as essential to the validity of an acceptance, that, besides the signature of the acceptor, there shall be written on the bill words indicative of his intention to accept, and the Bills of Exchange Act, 1878, does not dispense with the necessity of these added words, except in the case of acceptors who are drawees (i).

(i) Lord Curriehill.

(i) Lord Inglis.

(i) Lord Moncreiff.

(i) Court Sess. Cas., 4th Series, vol. vi, p. 1132.

On appeal,

May 13, 15, 24. Mr. *Benjamin*, Q.C., and Mr. *Romer*, maintained for the appellants that the late James M'Kinlay, by signing his name on the bill, came under an effectual legal obligation to pay its contents. A preliminary question was, whether the admission in the appellant's condescendence that James M'Kinlay "indorsed the bill," "he so indorsed it as joint obligant with the acceptors," was such an affirmance of a fact as to nonsuit them. If not, then the only other question was, whether James M'Kinlay was bound by the bill. The evidence showed: (1) that he signed his name with the intention of binding himself, and that it *was part of the agreement before the money was ad- [760
vanced that he should do so; (2), that Mr. Walker took the signature as an obligation for the full amount of the bill; and (3), that he advanced the money only on the faith of this obligation. The argument which prevailed with the majority of the judges below was, that if the signature means anything at all, it is in legal sense an "acceptance," and that it is insufficient in law as an acceptance in respect of the 11th section of the Mercantile Law Amendment (Scotland) Act, 1856, and 41 Vict., c. 13. But they maintained that James M'Kinlay did not become, in the technical sense, an acceptor of the bill, but a collateral obligant, and therefore these statutes did not apply. The Lord President gave three persons who were liable, besides the drawee: (1), "a party accepting for honor; (2), a person who is drawn upon may accept, because he holds the fund intended to be transferred to the payee; and (3), according to the law of Scotland a person may accept and will make himself liable after the drawee has accepted. He may make himself liable as an additional acceptor jointly and severally liable with the drawee." The latter was this case. There was no explanation offered of the fact of James M'Kinlay's signature on the back of a bill in which he had no interest, except that it was adhibited with the intention of binding himself. And Professor Bell says (Commentaries, 7th ed., vol. i, p. 428): "A collateral engagement may be undertaken by signing as indorser in circumstances which do not admit of a proper indorsement. Thus, no one can properly indorse who has no right to the bill, but the subscription as indorser with the intention of giving credit to the bill is an effectual collateral undertaking." In *Don v. Watt* (') a father had interposed his credit for an advance of money to his son by signing his

(') 26th May, 1812; F. C., vol. xvi, p. 647.

name on the back of an instrument to which he was not otherwise a party; both father and son were held liable on the note. Certainly that was the case of a promissory note, but no valid reason existed why in this particular a different rule should be applied to notes and bills of exchange. In *Macdonald v. Union Bank of Scotland* (*), A. drew a draft upon his own banker, and cashed it with another [761] banker after receiving B.'s *signature on the back of it; B. was held liable: see also *Penny v. Innes* (†) and *Jackson v. Hudson* (‡), there A. drew a bill on B., which was expressly accepted by B. and C.; Lord Ellenborough held that the signature of C. did not make him an acceptor, but imported a collateral undertaking: see Byles on Bills, 13th ed., pp. 189, 190; *Walters's Petition* (†), and *Matthews v. Blozsome* (‡), where the drawer was held to have a right against the first indorser as having made a new bill with the drawer.

But even if it should be held that the act of James M'Kinlay came within the legal category of an acceptance, James M'Kinlay's signature alone fulfilled the requirements of the statutes; for they submitted that the 11th section of the Mercantile Law Amendment (Scotland) Act, 1856, did not require any writing on the bill signifying acceptance but the signature.

The decision in *Hindhaugh v. Blakey* (*), which took the commercial world by surprise, was an appeal from a decision of the County Court of Northumberland as to the drawee's liability as acceptor upon a bill for £20. The judgment was that, according to the Mercantile Law Amendment Act, an acceptance must consist of something more than a mere signature. The Legislature immediately passed 41 Vict., c. 13, simply to declare that the law laid down in that decision was not in accordance with the meaning of the Legislature as expressed in the English and Scotch Mercantile Law Amendment Acts. But the signature in *Hindhaugh v. Blakey* was that of the drawee, and therefore the statute 41 Vict., c. 13, in obliterating that decision, did not need to go beyond the case of a proper drawee. Several of the judges in the Scotch court had, notwithstanding this, held *Hindhaugh v. Blakey* to be sound law; and the Lord President had held that 41 Vict., c. 13, was limited strictly to acceptances by the drawee, and that acceptance by all

(*) Court Sess. Cas. 3d Series vol. II.

(†) 2 Camp. 447.

(‡) 3rd.

(*) F. C. 102, 112, 459.

(†) 1 Comp. Mee. & Rec. 459.

(‡) 33 L. J. Q. B. 209.

(*) March 2, 1878; 3 C. P. D. 156.

other persons required more than the signature⁽¹⁾. But the appellants submitted that this was not the law, for it would be introducing into the Mercantile Law Amendment Acts a distinction between one kind of acceptors and another, of which *there had previously been no trace. The 41 [762 Vict., c. 13, simply declared the law, and enacted nothing new.

Further, if words were required over the signature of M'Kinlay to bind him, his handing the bill to Walker with the intention of being bound, was a mandate to Walker to fill up the bill, or to prefix to M'Kinlay's signature any words in accordance with the real intentions of the parties; and that authority being given you must take that to be done which ought to have been done. The contention that Mr. Walker being the drawer is liable before M'Kinlay, was rebutted by the evidence that Walker would not advance the money unless M'Kinlay was responsible. Regarding the fact that it was part of the arrangement that James M'Kinlay's name should be on the bill, no argument under the Stamp Acts could be successful. Nor did they intend to argue that it was a cautionary undertaking; but that it was a principal undertaking for the payment of the bill, and therefore the 6th section of the Mercantile Law Amendment (Scotland) Act, 1856, did not apply. Therefore, whether James M'Kinlay was viewed in the position of an acceptor or of a collateral obligant, they were entitled to succeed.

[They also cited *Russel v. Langstaffe* ⁽²⁾; *Montague v. Perkins* ⁽³⁾; *Armfield v. Allport* ⁽⁴⁾; *Forster v. Mackinnon* ⁽⁵⁾; *London and South Western Bank v. Wentworth* ⁽⁶⁾, where cases fully reviewed.]

Mr. John Pearson, Q.C., and Mr. Scott (with them Mr. Roger), contended for the respondent: (a), that an indorsement *prima facie* is to be taken as an indorsement and nothing more; (b) and if an indorsement only it was immaterial at what time it had been put on the bill; (c), it rested with those who say a simple indorsement means more than a common indorsement to prove it with absolute evidence. But the evidence here went no further than to show that Walker desired James M'Kinlay's name on the bill to enable him at a future time to discount the bill. It was not to hold the father liable if the sons failed. The bill was

⁽¹⁾ See Court Sess. Cas., 4th Series, vol. vi, at p. 1139.

⁽²⁾ 22 L. J. (C.P.), 187.

⁽³⁾ 27 L. J., Exch., 42.

⁽⁴⁾ 2 Doug., 514.

⁽⁵⁾ Law Rep., 4 C. P., 704.

⁽⁶⁾ 5 Exch. D., 96; 31 Eng. R., 575.

763] only *a temporary obligation for one of several sums, for the whole of which there was to be a permanent obligation in the way of a mortgage, which was arranged for so early as May, 1874, and granted afterwards by W. and J. M'Kinlay for the full amount of advances, viz., £5,000, which admittedly included the bill for £1,000; besides sums advanced by Mr. Walker to the two sons on their own security long before the bill was drawn. *Matthews v. Bloxsome* (*), if sound law, did not apply, for there it was under the man's own hand that he intended to be liable: that was not the case here. The real position of James M'Kinlay was that of indorser, who would be liable to a *bona fide* holder who had discounted the bill: see *dictum* of Mr. Justice Byles in *Foster v. Mackinnon* (*). But if said to be an acceptance, then James M'Kinlay not being the drawee, the signature did not comply with the 11th section of the Scotch Mercantile Law Amendment Act, 1856; that statute was passed to correct abuses in regard to bills of exchange, one of which was that nearly every bill had to be explained by extraneous evidence. The 1 & 2 Geo. 4, c. 78, enacted in respect to inland bills, that no acceptance should be sufficient unless "in writing on such bill;" the words added by the 11th section that there must be a signature clearly showed the purpose of the Legislature that both should be required. The argument that since the statute of 41 Vict., c. 13, the signature of all acceptors is sufficient, is not well founded. That statute was confined entirely to the case of a drawee, and was limited to the circumstance which had arisen in *Hindhaugh v. Blakey* and with good reason so limited; for the words of address to the drawee followed by the signature could leave no doubt as to the purpose of the signature. A party may be a drawee who never accepts, and whose signature never appears on the bill, and many persons may be liable on a bill who are not drawees, such as acceptor for honor, and formerly by the law of Scotland a person whose name was found upon the bill, although intending to be a mere cautioner, was held an acceptor, but could not by any conceivable reasoning be held a drawee. Therefore, there being by the law of Scotland such a thing as an acceptor who is not a drawee, the act 41 Vict., c. 13, 764] did not apply. It is argued that *the subscription of a name on the back of a bill, as here, is not an acceptance, but a collateral obligation, and is therefore not struck at by the Mercantile Law Amendment Acts. But it is rendered

(*) 33 L. J. (Q.B.), 209.

(*) Law Rep., 4 C. P., at p. 712.

quite plain by *Sharp v. Harvey* (*), *Macdougall v. Foyer* (*), *Don v. Watt* (*), and *Watters* (*), that in Scotland, previous to the act, the superscription of his name upon a bill by a person who had no right to it might put him in the position of acceptor, having full liability as such as regards the creditor in the bill. But the appellants sought to call this liability, though in every respect identical with an acceptance, a collateral obligation, this was a distinction without a difference. Further, if this so-called collateral obligation can be distinguished from an acceptance, it can only be as a kind of guarantee, and it is clearly provided by the 6th section of 19 & 20 Vict., c. 60, that guarantees shall have no effect unless they be in writing, and also subscribed by the party. *Macdonald v. Union Bank of Scotland* (*) did not apply to the case here. In the circumstances they submitted that the respondent was not liable for the amount of the bill as representative of James M'Kinlay.

[They also commented on *Ansell v. Baker* (*); Chitty on Contracts, 10th ed., p. 495; *Case of Jackson v. Duchaire* (*).]

Mr. Romer, in reply.

The Law Peers having considered their judgment, delivered the following opinions.

LORD BLACKBURN: My Lords, this is an appeal against that part of the interlocutor of the 1st of July, 1879, by which the first Division of the Court of Session, in conformity with the opinion of the majority of the seven judges who heard the case argued, found "that the document founded on No. 6 of process constituted no obligation against the late James M'Kinlay, and therefore constitutes none against *the defender, Alexander M'Kinlay." [765 The document in question is a bill of exchange in the following form: [His Lordship read the bill as given above and continued:]

I have come to the conclusion that this interlocutor is right. But I have not come to this conclusion on quite the same grounds as any one of the judges below. And as all cases relating to the form and effect of bills of exchange are in this commercial country of very great consequence, I think it desirable to state my reasons fully. I will first state what, according to my view of it, is the effect of the evidence produced. James M'Kinlay, the person whose

(*) Morr. Appex., voc. Bill of Exchange, 2.

(*) 7 March, 1818; F. C., vol. xix, 489.

(*) Court Sess. Cas., 3d Series, vol. ii,

(*) 18 Feb., 1810; F. C., vol. xv, 579. p. 963.

(*) 26 May, 1812; F. C., vol. xvi, 647. (*) 15 Q. B., 20.

(*) 3 T. R., 551.

signature appears on the back of the bill, was the father of William and Thomas M'Kinlay, and had assisted in setting them up in business as wood merchants at Strabane. William M'Kinlay is the only witness who knows anything about the arrangements between his deceased father and his firm of W. & T. M'Kinlay; and his evidence, which is in no way contradicted, is as follows: "It was not intended originally that this money should be advanced by my father. My father promised to arrange a loan for me after delivering over the premises, and I signed this £1,000 bill as a preliminary transaction; but in what way he intended to do it at that time I was not aware. Whether I signed the bill blank, or not, I don't remember the contents of it; but it was my father who got it. My father was not to become responsible for the loan, either by giving it himself, or becoming liable to the party who should ultimately advance it. It was intended to obtain the money on security of a mortgage. In giving the bill, I did not understand that my father would become a party to it. I knew by the letter remitting the money that Mr. Walker was the party who had advanced it. I had no doubt that was the money for the bill in question. I knew that the money came from him, but under what circumstances I did not understand." James M'Kinlay did enter into a negotiation with John E. Walker respecting an advance of money to W. & T. M'Kinlay. Both James M'Kinlay and J. E. Walker are dead. And what passed between them, except so far as it was reduced into writing, must be to a great extent a matter of inference. Some things are perfectly clear. J. E. Walker remitted to William & Thomas M'Kinlay £949 on the 1st of 766] June, 1874, in the *following letter: "1st June, 1874. I send you herewith letter of credit in your favor for £949 0s. 4d., being proceeds of your acceptance as under noted, of which you will be kind enough to acknowledge receipt. Note.

Amount of acceptance	£1,000	0	0
Interest £50	0	0	
Stamp	0	10	0
Bank Commission.	0	9	8
		50	19 8
Remitted by L. C.	£949	0	4"

And this document, described in the letter as "your," i.e., William & Thomas M'Kinlay's acceptance, was the document No. 6 of process in the interlocutor mentioned.

And it is also clear from the extract from J. E. Walker's ledger that on various days, beginning on the 12th of May and ending on the 14th of October, 1874, Walker also advanced to them £1,600; for which sum, with interest and stamps, in all £1,676 3s. 6d., William & Thomas M'Kinlay, on the 30th of November, 1874, accepted three bills for £558 14s. 6d. each. And there is nothing to show that James M'Kinlay, whose death took place in September, 1874, ever made himself liable for or was considered by J. E. Walker to have made himself liable for this £1,600 or any part of it. And it is material here to observe that £300 was advanced on the 12th of May, 1874, a fortnight before the bill for £1,000 was drawn. That sum, at least, must have been advanced to William & Thomas M'Kinlay on their own credit, or on the faith of the mortgage to secure £5,000, which, though not executed till the 3d of February, 1875, must have been arranged for some time before; it does not anywhere appear when. But, as far as regards the £1,000 bill of the 25th of May, 1874, there does appear on the back of it the indorsement of James M'Kinlay.

It appears from the evidence of Mr. Black, Walker's book-keeper, that he, by Walker's directions, drew the bill in question, the body of which is in his writing, that he gave it to J. E. Walker, who himself sent it out for acceptance. This bill, as prepared by Black, was not in any way addressed to James M'Kinlay. The next thing this [767 witness speaks to is that Walker told him that he had received back the bill accepted, and directed him to remit the money, which he did by the letter which I have already read. He further states: "I entered the bill in Mr. Walker's books, some time in June, 1874, to the debit of W. & T. M'Kinlay. The name of James M'Kinlay was not entered at all in connection with it. Mr. Walker was in the habit of looking at the books every morning, and must have seen the entry as to the bill. I remember a mortgage being granted by W. & T. M'Kinlay to Mr. Walker. It was not entered in the books. Mr. Walker said to me that what sums he had advanced to W. & T. M'Kinlay were covered by the mortgage. Q. Was the sum in the bill covered by the mortgage?—A. It was understood. Q. Did Mr. Walker say so?—A. Decidedly. There were subsequent bill transactions with W. & T. M'Kinlay, the sums in which also went into the mortgage."

Now it seems to me, with great respect to the judges below who find the fact otherwise, that it is not a proper inference of fact that Walker drew the bill, and sent it to James

M'Kinlay in order that he might accept it, or treated the signature of James M'Kinlay, after he got it, as an acceptance. If that had been so he would surely have caused Black to draw the bill on James M'Kinlay, and he would have caused James M'Kinlay's name to be entered in his books. But, no doubt, when James M'Kinlay put his name on the back of the bill, and handed it to Walker, he must have done so for some object, and it may be conjectured that it was in consequence of some request from Walker, which, as there is no writing proved, must be taken to have been verbal. But this, I think, is only conjecture. The only evidence produced bearing on this point is that of George Steele. Taking that to be all accurate, it leads to the conclusion that Walker was very glad to get the signature of the old man, which he thought made his security better; and, if I were to indulge in conjecture, I should think it probable Walker had said something to him about this being a large sum to advance on the faith of a mortgage being executed hereafter, which was not yet prepared, and that James M'Kinlay promised that, if for any reason that mortgage went off, he would see that bill paid. I certainly cannot, especially after seeing that £300 had been already advanced on the 12th of May, and that £1,300 more was advanced afterwards, draw the conclusion which is drawn by Lord Shand, that the money was advanced particularly on the faith of the signature of J. M'Kinlay, without which the loan would not have been given.

This brings us to the question whether there was, under such circumstances, according to the law of Scotland, any obligation constituted against J. M'Kinlay in his lifetime.

The Mercantile Law (Scotland) Amendment Act, 19 & 20 Vict. c. 60, and the Mercantile Law (England) Amendment Act, 19 & 20 Vict. c. 97, were passed for the purpose of remedying a mischief recited in the preambles of both acts in the same language: "Whereas inconvenience is felt by persons engaged in trade by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence."

Now, by the common law of England a contract to answer for the debt of another person might be proved in the same manner as any other contract. And I agree with what Lord Gifford in this case intimates, that there is no reason, either of justice or equity, why, when such a contract is proved to have been entered into by word of mouth, it should not be carried out by law. But he proceeds to say that there is no statute against it; and there I must differ from

him. It was thought by the English legislature that there was danger of contracts of particular kinds being established by false evidence, or by evidence of loose talk, when it never was really meant to make such a contract; and therefore it was provided by the Statute of Frauds, 29 Car. 2, c. 3, s. 4, that no action should be brought *inter alia* "upon any special promise to answer for the debt, default, or miscarriage of another person," "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This enactment compels the courts to refuse to enforce such a promise, however clearly it may be proved, unless there be the statutable evidence.

*There are constantly cases occurring in which it [769 is felt that it is morally very wrong to set up such a defence, and in which, as has been sometimes said, the statute for the prevention of frauds operates as a statute to facilitate fraud—nevertheless, on grounds, not, I take it, of justice but of expediency, this statute has been not only kept in force, but extended. It did not, however, before 1856, apply to Scotland. And the consequence was that the validity of such an agreement depended upon whether it was to be determined according to English or Scotch law. This fell precisely within the inconvenience recited in the preambles of 19 & 20 Vict. c. 60, and 19 & 20 Vict. c. 97. The Legislature might have remedied it, by, in 19 & 20 Vict. c. 97, altering the law of England so as to make it similar to that of Scotland, or by altering both laws so as to make something new be the law in both countries. What they did do was by 19 & 20 Vict. c. 60, s. 6, to extend the law of England to Scotland. By the general law of merchant adopted with some modifications, I believe, in every civilized country, and certainly in both England and Scotland, the acceptor of a bill of exchange comes under an obligation to any one who becomes the holder to pay him, and the drawer comes under an obligation to the holder to pay him, if the person on whom the bill is drawn does not accept and pay the bill, and the drawer has due notice of the dishonor. And any one who indorses that bill comes under an obligation to all subsequent holders of the bill precisely similar to that of the drawer, but he does not come under any such obligation to prior parties to the bill.

Pothier, *Contrat de Change*, No. 79, speaking of the contract by the indorser to his indorsee, says, "*Ce contrat est*
34 ENG. REP.

entièrement semblable à celui qui intervient entre le tireur et le donneur de valeur. Il produit entre l'endosseur et celui à qui l'ordre est passé, soit en cas de refus de paiement, soit en cas de refus d'acceptation, les mêmes obligations et les mêmes actions que la lettre de change produit entre le tireur et le donneur de valeur" ('). There have been some expressions in English cases to the effect that an indorser is a new drawer. Speaking of these in *Gwinell v. Herbert* (') Justice Littledale says, "It is said that in the case of a bill of exchange *every indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered as a new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing." This obligation incurred under the custom of merchants is not affected by the Statute of Frauds; and it has been very properly decided in *Macdonald v. Union Bank of Scotland* ('), that it is not affected by the 6th section of 19 & 20 Vict. c. 60. The motive or object of the party who incurs the obligation on the bill may be to guarantee a third person; and that may be known to the person who gives value for the bill, but the obligation is, by the custom of merchants, on the bill.

But I think that since 19 & 20 Vict. c. 60, s. 6, the law of Scotland is as the law of England was before, that no undertaking to answer for the debt of a third person is enforceable unless there is a writing signed as the statute requires. The question therefore is in my mind whether there is an obligation under the custom of merchants, as modified in Scotland, incurred on the bill by J. M'Kinlay to J. E. Walker.

The acceptor does incur such an obligation to the drawer. This bill was drawn by J. E. Walker on William and Thomas M'Kinlay, and accepted by them, and J. M'Kinlay then wrote his name on it. Can he be treated as an acceptor? Even if he had expressly written "Accepted, J. M'Kinlay," he could not have been so treated according to English law. This was expressly decided in *Jackson v. Hudson* ('), Lord Ellenborough says, "The acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honor of the drawer." I observe that Mr. Bell,

(') Works of Pothier, by Dupin, vol. iii, p. 155.

(') 5 Ad. & E., 439.

(') Court Sess. Cas., 3d Series, vol. ii, p. 963.

(') 2 Camp., at p. 448.

in his commentaries⁽¹⁾, falls into an error here as to the English law. He says that by it there can be no proper acceptance except by a drawee, "but a signature as acceptor will raise a collateral undertaking." Lord Ellenborough did not say so. He said that the facts which the counsel offered to prove might have *been evidence of a collateral un- [77] dertaking, if the declaration had been so framed. And so, no doubt, they would have been; and if there had been, in addition, a letter signed by Hudson, which could be construed as a memorandum of the contract, he would, on proof of them, have recovered. But Lord Ellenborough did not say that the writing of the words, "Accepted, J. Hudson," across the bill drawn upon Irving, was in itself a collateral undertaking, nor that it was in itself a sufficient memorandum within the Statute of Frauds. And I apprehend that neither position would have been tenable. Mr. Bell proceeds to say, "In Scotland a different view has been adopted, and, instead of a collateral undertaking, the subscription has been held to import a joint undertaking as acceptor of the bill or maker of the note." For this he cites three cases decided in Scotland, from which he draws that conclusion. He disapproves of it, and says, "The English doctrine is consistent with mercantile practice and understanding, but not quite so with the Stamp law; the Scottish doctrine is not quite reconcilable to either." All the seven judges below agree that the signature of J. M'Kinlay in this case could not operate as an acceptance; Lord Gifford and Lord Shand being of opinion that he, not being the drawee, and not intending to be an acceptor, did not become an acceptor at all. And Lord Shand examines at length the four cases, and it appears that there are no more, which are supposed to support the doctrine that such a writing of the name by one not a drawee might, in Scotland, operate as an acceptance, and shows that they do not support it, and my noble and learned friend opposite (Lord Watson) in his opinion, which I have had the advantage of reading, does the same, I shall say no more than that I am quite satisfied by their explanation of these cases. This is the reason on which I base my judgment, that the signature was not and could not be an acceptance. The other four judges hold that before 19 & 20 Vict. c. 60, s. 11, this name so written might have been treated as an acceptance, but that since that act it can no longer be so. I should have great difficulty in agreeing in this reasoning after the passing of 41 Vict. c. 13, which not only enacts what the true construc-

(1) Vol. i (7th ed.), p. 425.

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tion of the act shall in future be, but declares what it always has been. However, though not for the same reasons, all 772] seven judges *agreed that this signature could not operate as an acceptance; and I agree with them in that result.

But Lord Shand takes another view of the effect of writing the name, namely, that it operated as an indorsement by J. M'Kinlay to E. Walker, the drawer of the bill.

An indorsement in general is a transfer in writing by the holder of the bill to a new holder on whom the property is thereby conferred; and it is clear that J. M'Kinlay was not such an indorser. But I quite agree that by the custom of merchants, as modified by English law, there may also be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer to a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what was called an *aval* (said to be an antiquated word signifying "under-writing"), either on the bill itself or on a separate paper; and if such an *aval* was given by any one, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given.

It appears from Pothier, Du Contrat de Change, Part I, chap. 4, Article VII, De l'obligation qui naît des avals ('), that the *aval* might be made by one who gave his name, either by way of incurring responsibility for the drawer, placing the signature under the name of the drawer, or for the indorser, placing it under the indorsement, or for the acceptor, placing it under that of the acceptance. An *aval* for the honor of the acceptor, even if on the bill, is not effectual in English law, as appears by *Jackson v. Hudson* (*). That case cannot now be questioned after the lapse of so many years, even if it could have been successfully impugned at the time, which I do not think it could. But the indorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an *aval*. The effect, according to English law, of such an indorsement is recognized by Lord Holt, in *Hill v. Lewis* (*), and again in *Penny v. Innes* ('); such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subse- 773] quently. It is not a collateral engagement, *but

(') Works of Pothier, by Dupin, vol. iii, p. 174.

(*) 2 Camp., at p. 448.

(*) 1 Salk., at p. 133.

(') 1 C. M. & R., 439.

one on the bill; and it is for that reason, and because the original bill, by the custom of merchants, has incident to it the capacity of an indorsement in the nature of an *aval* on it, that such an indorsement requires no new stamp. The law of Scotland also gives effect to such an indorsement. Indeed, no better example of an indorsement having the effect of an *aval* for the drawer of a bill can be given than is afforded by *Macdonald v. Union Bank of Scotland* (¹), where the cashier of the Union Bank, having refused to give cash on the credit of a cheque drawn on another bank, agreed to give it on Macdonald indorsing his name on it. This was held to make Macdonald liable as indorser to the Union Bank. In *Penny v. Innes* (²) it appeared that Innes (who, as I think we must understand the facts, had agreed with the plaintiff to become indorser in the nature of an *aval* for Wilson, the drawer of the bill, who was about to transfer the bill to the plaintiff), did not actually write his name on the bill till after Wilson, the drawer, had written his, and it was decided that the order in which the names were written was immaterial.

The case of *Matthews v. Bloxsome* (³) was much, and properly, relied upon by the counsel for the appellants. It was one very peculiar in its circumstances: the defendant had written to one of the plaintiffs a letter in these terms:—"Sir, my brother Richard wishes me to join security with Mr. Edmands for £150. I beg to say I am quite agreeable to do so on the conditions entered into between you and him.—J. Bloxsome." This, it appears, was thought by the court not to be a sufficient memorandum in writing signed by J. Bloxsome to satisfy the Statute of Frauds, because the conditions were never put in writing. But Richard Bloxsome procured three bill stamps of an amount sufficient to cover £50 each. On the back of these Edmands and J. Bloxsome indorsed their names in order to enable him to obtain the £150 from the plaintiff. Richard Bloxsome wrote across them, "Accepted, Richard Bloxsome," and delivered them in that state to the plaintiffs, who gave him the £150. It was perfectly manifest that the defendant gave authority to fill up the blank stamp paper in such a way as would make him liable as indorser to the plaintiffs, and [774 meant that to be done; if the blanks had been filled up by the plaintiffs with the name of one of their clerks as drawer of a bill payable to bearer, there could have been no defence. But by a blunder of the plaintiffs, it was filled up

(¹) Court Sess. Cas., 3d Series, vol. ii, p. 963.

(²) 1 C. M. & R., 439.

(³) 33 L. J. (Q.B.), 209.

inserting their own names as drawers. No one could help wishing to baffle such a defence. I was a party to the judgment of the Queen's Bench by which they did so, but I greatly doubt if it was sound. It seems to me to be a very violent thing to construe a document which, on the face of it, purported not to be drawn by the plaintiffs, and indorsed for them by the defendant, who purported to be the drawer, as being, in consequence of extrinsic evidence, in legal effect drawn by the defendant, and indorsed to the person who purported on it to be drawer. But that case, if good law, can only be authority for considering a bill as if it were amended so as to be what it was intended to be, when the evidence is clear what the intention was, and that the bill was drawn up in its actual form by blunder. In the present case the bill on the face of it purports to be drawn by J. E. Walker on William and Thomas M'Kinlay, and to be payable to J. E. Walker's order. So far is that from a blunder, that I think it clear it was what was intended from the beginning. J. M'Kinlay wrote his name on the back, and any one who afterwards took the bill would have the right to hold J. M'Kinlay liable to him as an indorser, in the nature of an *aval* for the drawer. But it does not purport to be an indorsement to walker, who was drawer, but the contrary. Even if it was intended, which I think is not clearly made out, that J. M'Kinlay was to bind himself as a surety for his sons to J. E. Walker, and wrote his name on the back of the bill with that intent, he did not carry out his intention. And to construe the bill, by the aid of the extraneous evidence, as operating as a drawing by J. M'Kinlay on William and Thomas M'Kinlay, and an indorsement by him as drawer to Walker would not be a rectifying a blunder made in drawing up the instrument, so as to construe it as if drawn up according to the original intention, but a making of a new instrument, because, owing to their mistakes of law, the instrument which they drew up did not operate as was wished. I therefore come to the conclusion that what was done cannot be effectual as a guarantee for 775] William and T. M'Kinlay *for want of a writing signed, and that it cannot be effectual as an obligation on the bill, either as an acceptance or as an indorsement to E. Walker, who, on the face of the bill, purports to be the drawer, who would *prima facie* be liable to indorsers, and not entitled to sue them.

The result is that I think the appeal should be dismissed.

LORD HATHERLEY: My Lords, in considering this case I had no doubt, immediately after the hearing, that no case

could be made out upon this claim by treating the document signed by M'Kinlay the elder as a document with a guarantee, owing to the statute in the way of such a construction. The point on which I did entertain some doubt was as to what was the effect of the writing by M'Kinlay of the name upon the bill, seeing that it was necessary, as far as one could, to attribute some force and effect to the signature which he so added to the bill. But I had the advantage, whilst considering the case, of seeing the opinion of my noble and learned friend opposite (Lord Blackburn), who has just delivered that opinion to your Lordships, and it appeared to me to put the matter in so clear and precise a way that it would be an idle form and ceremony if I went over the same ground again; and also if I did so I might be appearing to give as the result of my own reasoning that which I have in fact finally and decisively been led into entirely by that opinion. Therefore I am quite content to rest my judgment, which coincides with that of my noble and learned friend opposite, upon the reasons which he has given in the opinion which he has now delivered to the House.

LORD WATSON: My Lords, in February, 1874, William and Thomas M'Kinlay commenced business as timber merchants at Strabane, in Ireland, under the firm of W. & T. M'Kinlay; and shortly thereafter they commissioned their father, the late James M'Kinlay, to procure for them in Glasgow, where he resided, an advance of £1,000 on the personal credit of the firm. Some communings then took place between James M'Kinlay and the late James Ewing Walker, coach proprietor, in Glasgow, the result of which was that Mr. Walker *signed, as drawer, a bill bearing date the 25th of May, 1874, for £1,000 at twelve months, addressed to "Messrs. Wm. & Thos. M'Kinlay, wood merchants, Strabane," which he handed to James M'Kinlay. The latter forwarded the bill to his sons, who returned it duly accepted in their firm's name. James M'Kinlay then wrote his own signature across the back of the bill, and delivered it to Mr. Walker, who, on the faith of the document thus completed, remitted its amount, less discount, to the drawees. The drawer kept the bill until the 10th of March, 1875, when he discounted it with the National Bank of Scotland, signing as indorser. The drawees failed to pay the bill at maturity, and it was retired by Mr. Walker.

James M'Kinlay died in September, 1874, and Mr. Walker in September, 1875. The action in which the present appeal is taken was raised by the testamentary trustees of Mr. Walker (the appellants) against Alexander M'Kinlay (the

respondent) as representing his father, the deceased James M'Kinlay; and its conclusions are for payment of the amount of the bill and interest, subject to certain specified deductions. Besides detailing the circumstances in which the bill was signed by the various parties whose names appear upon it, the appellants endeavor to indicate, in their pleadings in the court below, the character in which, and the purpose for which, James M'Kinlay adhibited his signature before delivering the bill to the drawee. Their record appears to me to be framed upon the footing that, in signing his name, James M'Kinlay intended to undertake, and did incur a direct obligation to the drawee in the event, which has occurred, of non-payment by the drawees; but its framers were obviously in great uncertainty as to the precise legal category to which that obligation ought to be assigned. In their summons the appellants libel upon the bill as "indorsed by the said James M'Kinlay," in the condescendence they state that "he so indorsed it as joint obligant with the acceptors and co-acceptor with them for payment of its contents;" and again, in their answer to the separate statement of facts for the respondent they aver that his name was "put upon the bill as an acceptor or joint obligant by arrangement." It has been contended by the respondents, and several of the judges in the court below have [777] held, that the only case made on record by *the appellants is that James M'Kinlay was an acceptor, and consequently that their action must fail if that allegation is irrelevant or is not established. I think that is far too technical a view of the appellants' pleadings. I adopt Lord Shand's reasoning upon this point, and concur with his Lordship in holding that the record fairly raises a more general issue, and that the case as it stands must be decided on the merits of the question whether M'Kinlay undertook liability to Mr Walker for payment of the bill.

The Lord Ordinary, after the record was closed, allowed a proof before answer; and both parties led proof, which obviously is not confined to facts and circumstances attendant upon the making and issue of the bill, but includes evidence bearing upon the existence of an independent agreement between James M'Kinlay and Mr. Walker as to the liability to be undertaken by M'Kinlay. It is difficult to suppose that the respondent would have permitted evidence of that kind to be led without objection, had he then read the record in the narrow sense for which he contended at your Lordships' bar.

The Lord Ordinary on the 7th of June, 1878, gave judg-

ment for the appellants, and in his interlocutor for the same date, the first finding is to the effect that the appellants "are entitled to recover from the defender (respondent), Alexander M'Kinlay, son of the deceased James M'Kinlay, the sum of £1,000 sterling contained in the bill libelled, with interest," &c.

The respondent reclaimed against this judgment, and the First Division of the court appointed the cause to be heard before themselves, with the addition of three judges of the Second Division, on the question whether the first finding in the Lord Ordinary's interlocutor ought to be adhered to or altered. And on the 1st of July, 1879, the Lords of the First Division, in conformity with the opinion of the majority of the seven judges, found that the bill libelled "constituted no obligation against the late James M'Kinlay, and therefore constitutes none against the defender Alexander M'Kinlay," and assoilzied the respondent.

The majority of the seven judges consisted of the Lord President, the Lord Justice Clerk, Lords Deas, Ormidale, and Muir; Lords Gifford and Shand being the minority. The reasoning upon which the judgment of the majority is rested appears to be *(1), that James M'Kinlay, though [778 not a drawee, must be regarded as an acceptor of the bill, and (2), that his signature did not constitute a valid acceptance, because sect. 11 of the Mercantile Law Amendment (Scotland) Act requires, as essential to the validity of an acceptance, that, besides the signature of the acceptor, there shall be written on the bill words indicative of his intention to accept, and the Bills of Exchange Act, 1878, does not dispense with the necessity for these added words, except in the case of acceptors who are drawees. Some of their Lordships, e.g., the Lord President, treated the question as one of relevancy, holding, irrespective of any evidence, that the appellants' case failed upon their own statement of it, namely, that James M'Kinlay was an acceptor. Others of their Lordships decided the question upon its merits, holding it to be proved that James M'Kinlay put his name upon the bill with the intention and result of his becoming an acceptor. But the judges of the majority were unanimously of opinion that it is settled law in Scotland that James M'Kinlay, though not a drawee, might competently become a party to the bill *quā* acceptor.

I am of opinion that the interlocutor of the First Division, so far as appealed from, ought to be affirmed, but, with all respect for the learned judges of the majority, I am unable

to concur in the reasons which they have assigned for their decision.

Various important decisions were raised and argued at your Lordships' bar, but the only question which, in my opinion, the House requires to determine is this: What liability, if any, did James M'Kinlay undertake to James Ewing Walker, the drawer of the bill?

In considering that question, it is necessary to distinguish between the liabilities which the law-merchant attaches to a person who, by signing, has become a party to a bill, and those liabilities which may arise out of an understanding or agreement of parties extrinsic of the bill. In some cases the precise character and consequent liabilities of parties to a bill are conclusively fixed by the tenor of the document. The person who draws a bill of exchange, and his addressee who accepts it, can never, according to the principles of the law-merchant, be liable otherwise than in their respective [779] characters of drawer and acceptor. *In other cases the character and liability of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which indorsements were made upon a bill. But such proof, when it is admissible, must be strictly limited to facts and circumstances attendant upon the making, issue, or indorsement of the bill. On the other hand, it is undoubtedly competent for parties to a bill, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law-merchant. The drawer and acceptor of a bill may agree that, as between themselves, the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law-merchant.

This leads me to consider whether the late James M'Kinlay, as a party to the bill in the sense of the law-merchant, was under obligation, failing payment by his two sons or their firm, to pay the contents to Mr. Walker; and in so doing, I assume as legitimate materials for inference all those facts connected with the making, issuing, and discounting of the bill to which I have already adverted.

The tenor of the bill is, in my opinion, conclusive against the view that James M'Kinlay was an acceptor. Save in the case of acceptances for honor or *per* procuration, no one can become a party to a bill *quâ* acceptor who is not a

proper drawee, or, in other words, an addressee. That a person, not an addressee, who signs in the same circumstances as James M'Kinlay, thereby becomes an acceptor, has, however, been held in the court below to be authoritatively settled in the law of Scotland. To that proposition, which depends upon the accuracy of a statement in the Commentaries of Mr. Bell⁽¹⁾, and which is repeated by Mr. Thomson in his Treatise on Bills of Exchange, I cannot assent. Mr. Bell infers, from the cases of *Don v. Watt*⁽²⁾, and *Watters, Petitioner*⁽³⁾, that in Scotland a signature as an acceptor by a person not a drawee, "is held to import a joint undertaking as acceptor *of the bill or maker [780 of the note;]" but the learned author frankly concedes that the doctrine is not quite reconcilable with mercantile practice and understanding. It is, in my opinion, unnecessary to consider how much authority this House ought to require before sanctioning such a departure from the principles of the law-merchant, because the cases cited by Mr. Bell do not appear to me to support the doctrine which he deduces from them.

The case of *Don v. Watt*⁽²⁾ related not to a bill of exchange, but to a promissory note; and there is obviously no principle of the law-merchant which can prevent any number of persons becoming bound as promisors along with the original grantor of the note. This distinction, which is a very material one, was not adverted to by the court, who in this and the subsequent case of *Watters*⁽³⁾ seem to have dealt with the cases of an acceptor and of a promisor as identical. But, assuming that the court did deal with the promissory note upon principles which they hold to be equally applicable to bills of exchange, it does not appear upon what footing they held the defender liable, whether as a party promisor or as bound by implied agreement to the payee. The Lord Ordinary expressly found that he was liable as indorsee, but the Inner House recalled that finding and decerned against him in general terms, without specifying in what character liability attached to him.

There are only two very meagre reports of the case of *Watters*. One of these is in the form of a note by Baron Hume, which runs thus: "A person who was meant to be a joint acceptor with two others put his name on the back of the bill. He is found liable nevertheless as joint acceptor,

⁽¹⁾ Bell's Com., vol. i (7th ed.), p. 425.

⁽²⁾ 7th of March, 1818; Fac. Col., vol.

⁽³⁾ 26th of May, 1812; Fac. Col., vol. xix, p. 489.

xvi, p. 647.

the purpose being plain. The bill came in place of a former, to which he was one of three acceptors." The other report is in the Faculty Collection, and the whole information given by the reporter as to the facts of the case is that Watters, along with two others, accepted a bill drawn upon them by one Robert Barrie; and then he adds: "Upon becoming due it was renewed, but Watters wrote his name upon the back of the bill." It is by no means clear that the renewed bill was not addressed to all the three acceptors of the original bill, including *Watters; and the probability that he was a drawee is strengthened by the report of the argument for the petitioner, who did not defend himself on the ground that, not being a drawee, he could not by his subscription become an acceptor. The only plea urged in defence was that the petitioner was liable as an indorser, "because he had signed on the back of the bill," a very special plea, and one which seems to involve an admission that he would have been liable as acceptor if he had signed on the face of the document. But, be that as it may, the interlocutor of the Lord Ordinary, which became the judgment of the Inner House, and which is quoted at length in the opinion of Lord Shand, contains articulate findings which make it perfectly plain that the decision went upon considerations quite independent of Watters' position as a party to the bill.

Neither of the cases of *Sharp* (¹) and *Macdougall* (²), which were cited in argument, has any bearing upon the doctrine in question. These are cases relating to the liability of a drawee who, in accepting, added to his signature the words "as cautioner;" and Mr. Bell (³) thus correctly states their import: "Acceptance as a cautioner is deemed absolute acceptance; and the qualification, whatever effect it may have in a question of relief between the parties themselves, has none at all as against the holder of the bill."

If James M'Kinlay cannot be regarded as an acceptor, no question can arise in regard to the Mercantile Law Amendment (Scotland) Act, 1856, and the Bills of Exchange Act, 1878. But I cannot help saying that if James M'Kinlay, apart from the provisions of these statutes, could or did become an acceptor according to the law of Scotland, I could not have agreed with the learned judges of the majority in holding that his acceptance was invalid by reason of the provisions of sect. xi, of the act of 1856. It appears to me

(¹) 1808. Morr. Dict. App., *voce* Bill of (²) 13th of Feb. 1810; Fac. Col., vol. Exchange, No. 22. xv, p. 579.

(³) Bell's Com., vol. i (7th ed.), p. 424.

that in construing the two acts together their Lordships have misapprehended the true character and effect of the act of 1878. They have dealt with that statute as if it were a repealing, and not, as it professedly is, a declaratory act. They *assume that the case of *Hindhaugh v. Blakey* (1) was well decided, and that sect. xi, of the act of 1856, requires in order to due acceptance, not only the signature of the acceptor, but words of acceptance to which the signature must be appended, and they read the act of 1878 as repealing the provisions of sect. xi, in so far only as these apply to acceptors who are also drawees, leaving them still operative in the case of acceptors such as they have assumed or held James M'Kinlay to be. Now the act of 1878 seems to me to be equivalent to a declaration that the case of *Hindhaugh v. Blakey* (1) was wrongly decided; and seeing that sect. xi, uses precisely the same language in regard to all acceptors falling within its scope, I should have found it impossible to read the clause as requiring words in the case of an acceptor in the position of James M'Kinlay which would not have been necessary had he been a drawee.

I am of opinion that the character in which James M'Kinlay did become a party to the bill was, both in fact and law, that of an indorser; and that in determining his legal position the circumstances that M'Kinlay's indorsement was written before the bill was delivered to the drawer and the money advanced by him is quite immaterial. No doubt a proper indorsement can only be made by one who has a right to the bill, and who thereby transmits the right, and also incurs certain well-known and well-defined liabilities. But it is perfectly consistent with the principles of the law-merchant that a person who writes an indorsement with intent to become party to a bill, shall be held—notwithstanding he has not and therefore cannot give any right to its contents—to be subject, as in a question with subsequent holders, to all the liabilities of a proper indorser. I fail to see upon what principle James M'Kinlay can be interpolated as a party to the bill in question between the drawer and the acceptor. To hold that a stranger to the bill who writes his name across the back of it, before it has passed out of the hands of the drawer, thereby becomes liable to the drawer, failing payment by the drawees, appears to me to be as inconsistent with the principles of the law-merchant as to hold that there may be a drawer other than the original drawer and payee, or that there may be an acceptor other than the drawee or one who accepts as his agent or for

(1) 8 C. P. D., 136.

783] his honor. It may be convenient *in some cases to describe the liability of a person whose name is on a bill, and who is neither payee nor drawee, as being the liability of a drawer or acceptor, but in these cases liability cannot arise from such person being either a drawer or an acceptor in the sense of the law-merchant, but from some agreement extrinsic of the bill itself.

I should have had less difficulty in holding that James M'Kinlay, as party to the bill, was an indorser, and therefore not liable to pay Mr. Walker, the drawer, when it was dishonored by the acceptors, had it not been that the point seems to have been otherwise decided by the Court of Queen's Bench in *Matthews v. Bloxsome*⁽¹⁾. The report of the case is not satisfactory, and leaves room for doubt whether the decision was intended to go so far as the report states. If it was, I cannot avoid the conclusion that the decision is at variance with sound principles, and that whatever may now be its value as a precedent in England, it ought not to be taken as a good authority in a Scotch appeal.

It still remains for consideration whether the transaction between Mr. Walker and James M'Kinlay was completed on the footing that the latter was to be bound to the drawer failing payment by the drawees. As a party to the bill he was not so bound, still the appellants would be entitled to decree if it were proved, by extrinsic evidence, that their author, Mr. Walker, advanced his money upon the faith of such an arrangement as they allege. But the appellants have, in my opinion, failed to adduce evidence either competent or sufficient for that purpose.

It appears to me that the arrangement which the appellants seek to prove is in effect an undertaking of guarantee, and accordingly that their proof, which so far as material consists of oral testimony, is excluded by the provisions of the 6th section of the Mercantile Law Amendment (Scotland) Act, 1856. I am not prepared to hold that an obligation to sign a bill as one of several drawees and acceptors necessarily constitutes an undertaking of guarantee; but in this case it is to my mind perfectly clear that James M'Kinlay never agreed to be an acceptor. George Steele deposes that Mr. Walker, before he got the completed bill, told him that "the old man" (meaning M'Kinlay the father) "was to sign 784] *the bill along with his two sons," and, after he got the completed bill, that it was "all right;" that it was signed by the "old man." But there is no evidence whatever that M'Kinlay was to sign in the character of an ac-

(1) 33 L. J. (Q.B.), 209.

ceptor. The form in which the bill was drawn and sent for acceptance by Mr. Walker contradicts that supposition, and the witness, George Steele, states that Mr. Walker, two or three weeks before he remitted the proceeds of the bill in question to Strabane, told him (Steele) "that James M'Kinlay had asked him to advance £1,000 for them" (i.e., his two sons, the drawees), "upon his security," and that he "had agreed to advance it." Had James M'Kinlay's signature been sufficient, according to the law-merchant, to make him liable to the drawer, the provisions of sect. 6 of the act of 1856 would have been inapplicable, notwithstanding the fact that his obligation was in substance a guarantee; but when it is proposed, as in the present case, to establish by extrinsic evidence an obligation which is substantially a guarantee, the act applies, and parol proof is incompetent.

If the appellants' evidence were held to be competent, I am of opinion that it is not sufficient to establish any agreement or understanding on the part of M'Kinlay to the effect that he was to be liable to the drawer. There was apparently no third person present at their communings in regard to the bill, and there is no evidence of what passed between them except the indirect testimony of George Steele as to certain statements made to him by Mr. Walker. These hearsay statements through the decease of Mr. Walker became admissible in evidence, subject always to these qualifications: (1.) That they are to be received *cum nota*, because the respondents had no opportunity of testing their weight or credibility by cross-examination of the person who made them; and (2.) That when ambiguous they must be read *contra proferentem*. Whilst these statements must be held to express Mr. Walker's view of the transaction, they do not necessarily represent the understanding of James M'Kinlay. There is nothing in the case to suggest that either of them was unfamiliar with bill transactions, and it is nowhere proved that the liability which M'Kinlay was to incur by signing his name was ever discussed or referred to in the course of their communings. It lay with the appellants to prove, and I think they have failed to prove, that there *ever was any mutual understanding or agreement as [785 to that matter. The impression which careful perusal of the proof has left upon my mind is, that nothing more was agreed upon between the parties than that M'Kinlay should write across the back of the bill, and that there was no *consensus in idem* as to the effect of the indorsement. The one agreed to give and the other to take his signature for what

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it was worth, M'Kinlay intending to resist and Walker to enforce liability, so far as the law would permit.

Being of opinion that James M'Kinlay was not, as a party to the bill, under any obligation to the drawer, and that there is no competent or sufficient evidence of his agreement to undertake such an obligation, I think the appeal ought to be dismissed.

LORD SELBORNE, L.C. : My Lords, having had the advantage of seeing the written opinions of two of my noble and learned friends who have already addressed your Lordships, and finding in them everything which I could myself have desired to say with respect to this case, I might well content myself with simply expressing my entire agreement with them; but as the decision in the court below was mainly rested upon the view taken by that court of the proper construction of the Mercantile Law Amendment (Scotland) Act, 1856, s. 11, and the subsequent act of 1878 (41 Vict., c. 13), I think it right to add the expression of my own clear opinion that the act of 1878 is in effect a declaration by the Legislature that the decision of the English Common Pleas Division in the case of *Hindhaugh v. Blakey* (1) was erroneous; and, as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish Act between one kind of acceptance and another, I think that the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill (which was the actual case in *Hindhaugh v. Blakey*) is necessarily to displace the whole construction of the English statute on which that decision was founded.

If, therefore, I had agreed with the majority of the judges [786] in *the court below that James M'Kinlay ought to be held to have signed the bill in the present case as an acceptor, in the sense in which the term "acceptance" is used in the 11th section of the Mercantile Law Amendment (Scotland) Act, I should have been compelled to dissent from their conclusion in favor of the respondent. But, for the reasons which have been already stated in the opinions of my two noble and learned friends, I hold it to be quite clear that James M'Kinlay was not an acceptor, within the meaning of that section or otherwise in any true and proper sense of the word, and that his liability, as insisted upon by the appellants, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law-

(1) 3 C. P. D., 136.

merchant would infer from his mere signature as it appears upon the face of the bill, could only be proved by a writing properly signed under the 6th section of the statute, which writing in the present case is absent.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journal, 14th June, 1880.

Agents for appellants: *Simson & Wakeford.*

Agents for respondent: *Holmes, Anton & Greig.*

Most of the States have statutes, similar to the Revised Statutes of New York, provide (1 R. S., 768, §§ 6-10, 1 Edm. St., 722) as follows:

§ 6. No person within the State shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing signed by himself or his lawful agent.

A check is a bill of exchange within this section: *Risley v. Phenix, etc.*, 83 N. Y., 818.

So a written order or request by one person to another for the payment of a specified sum of money to a third person, absolutely and at all events: *Luff v. Pope*, 5 Hill, 413, 7 id., 577.

An order not payable on its face in money, and drawn on a particular fund, is not a bill of exchange within this statute requiring a written acceptance, as an order by a landlord on his tenant to pay the rents accruing during a specified period, and this though it appeared *abundante* the rent was payable in money: *Morton v. Nayler*, 1 Hill, 583.

See also *Hall v. Buffalo*, 1 Keyes, 193, 23 Eng. Rep., 828 note; *Id.*, 470 note; *Tibbits v. George*, 6 Nev. & Man., 804, 5 Ad. & Ellis, 107; *Ex parte Shelland*, 29 Law Times Rep. (N.S.), 621; 1 *Daniel's Neg. Instr.* (3d. ed.), § 16a.

An oral acceptance of such an order is binding: *Tibbits v. George*, 5 Ad. & Ellis, 107, 6 Nev. & Man., 804.

The mere fact that the drawee has funds of the drawer, creates no obligation to accept a bill which a payee or indorsee can enforce: *New York, etc.*, v. *Gibson*, 5 Duer, 574.

Where the holder of a bill of exchange transmits it to his agent for presentment to the drawer, such agent has no right to receive anything short

of an explicit and unequivocal acceptance, without giving notice to the holder, as in case of non-acceptance, and he will be liable for any loss the holder may sustain in consequence of his neglect so to do: *Walker v. Bank*, 9 N. Y., 582.

A verbal promise by a bank to pay a check does not create a cause of action thereon: *Risley v. Phenix*, 83 N. Y., 818.

The acceptance of a bill of exchange, in order to bind the drawee, must be in writing: *Luff v. Pope*, 5 Hill, 413, 7 Hill 577; *Pike v. Irwin*, 1 Sandf., 14; *Quin v. Hanford*, 1 Hill, 82; *Loonie v. Hogan*, 9 N. Y., 441, affirming 12 N. Y. Leg. Obs., 435.

The defendants, in consideration that the plaintiffs would furnish to one Ackley such coal as he might from time to time require, promised to accept the bills drawn upon them by Ackley, in favor of the plaintiffs, for the prices of coal so delivered. A bill for \$656.37 was drawn upon them by Ackley, for coal so furnished, which, upon its presentment by the plaintiffs, the defendants refused to accept.

Held, that the promise of the defendants, not being in writing, was void, under § 6 of the Revised Statutes relating to promissory notes and bills of exchange:

Held, that the plaintiffs were not within the exception created by § 10 of the statute, as they had neither drawn nor negotiated the bill in question:

Held, that the exception only applies to those who, having transferred a bill for value, have, in consequence of its non-acceptance, been rendered liable as drawers or indorsors: *Blakeston v. Dudley*, 5 Duer, 373.

A drawee of a bill of exchange may charge himself as acceptor by simply

writing his name across the face of it, and this notwithstanding the provision of the Revised Statutes (1 R. S., 757, § 6, 2d ed.), requiring an acceptance to be in writing and signed by the party : *Spear v. Pratt*, 2 Hill, 583.

An authority given by a father to his son to accept, in his name, a bill of exchange for \$2,000, to be used for a particular purpose, will not warrant him in accepting a bill for a part of the amount given for another purpose : *Nixon v. Palmer*, 8 N. Y., 398.

An authority to draw must be strictly followed : *Ulster v. McFarlan*, 5 Hill, 433.

§ 7. If such acceptance be written on a paper, other than a bill, it shall not bind the acceptor, except to a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration.

§ 8. An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance, in favor of any person, who, upon the faith thereof, shall have received the bill for a valuable consideration.

By the Revised Statutes, an acceptance of a bill of exchange is void unless it be in writing ; but before this statutory provision, although a parol acceptance of a bill already drawn was good, a parol agreement to accept a bill to be drawn in future could not be enforced by an indorsee between whom and the drawee no communication had passed, and who had not taken the bill upon the faith of such promise. So, although after the bill has been passed, the drawee gives a conditional acceptance in writing to the drawer, which is shown to the holder, such holder cannot maintain an action upon the acceptance, not having taken the bill upon the faith of the acceptance. Neither can the holder of a bill of exchange maintain an action upon it against the acceptor, where he has taken it for a pre-existing debt, if there exist equities in the case which would prevent a recovery in an action by the drawer against the acceptor. A valid agreement to accept may be declared on as an acceptance : *Ontario Bank v. Worthington*, 12 Wend., 593.

The section of the statute providing that an unconditional promise in writ-

ing to accept a bill, before it is drawn, shall be deemed an actual acceptance in favor of every person, who, upon the faith thereof shall have received the bill for a valuable consideration, is to be reasonably construed with a view to accomplish the purposes intended. Where, after a bill of exchange has been negotiated, upon condition, however, of its acceptance, the drawer, at the suggestion of the drawee, writes upon its face "payable through the clearing house," such an alteration amounts to the drawing of a new bill, within the meaning of said statute, so that a promise to accept, made after the conditional negotiation of such bill and just before such alteration, is to be considered as made "before it is drawn." Upon the facts of this case, held, that the promise of the defendants to accept the bill of exchange in suit, was an unconditional one, and that defendants were liable thereon : *Louisiana, etc., v. Schuchardt*, 15 Hun, 405.

An unconditional promise in writing to accept a draft, made before it is drawn, is deemed an acceptance under the statute (§ 8) in favor of a person receiving the bill for a valuable consideration, on the faith of such promise : *Starr v. Murchison*, 1 City Cts. Rep., 413.

A letter of credit conferring an absolute authority on the person addressed to draw bills on the writer, amounts to an unconditional written promise to accept, within 1 R. S., 768, § 8 : *Ulster Bank v. McFarlan*, 5 Hill, 433, affirmed 3 Den., 553.

See also *Burney v. Worthington*, 37 N. Y., 113, 4 Abb. (N.S.), 205.

A written promise to accept is valid, though it do not particularly describe or identify the bills to be drawn : *Ulster Bank v. McFarlan*, 5 Hill, 433, affirmed 3 Den., 553.

Defendant executed a power of attorney as follows : "I hereby authorize Horace Loveland, as my agent, to make drafts on me from time to time as may be necessary for the purchase of lumber on my account, and to consign the same to the care of P. W. Scribner & Co." In an action upon a draft drawn by Loveland in his own name, and discounted by plaintiff, upon the faith of and upon the delivery of the instrument,—

Held, that the authority given was

absolute within the prescribed limits, and was equivalent to an unconditional promise to pay drafts so drawn; that the words "as my agent" did not refer to the form of the draft, but to the capacity in which Loveland acted, and if he drew the draft as agent, it was not material whether he described himself as such or not; that the words "as may be necessary for the purchase of lumber" did not constitute a condition precedent which plaintiff was required to show had been performed, but it was for the agent to determine the necessity; that the agent, by procuring the discount, represented that it was to be used in the business and that the amount was necessary, which representation bound the principal; also, that the requirement as to shipping the lumber was not a condition to the power to draw; at least, the presumption was that the agent observed these directions, and if defendant could avail himself of a neglect so to do, it was incumbent upon him to show it.

Also, held, that the facts were sufficient to charge defendant as acceptor, under the statute, 1 R. S., 768, § 8: *Merchants Bank v. Griswold*, 73 N. Y., 473, distinguishing *Nixon v. Palmer*, 9 id., 398; *Bank v. Gibson*, 5 Duer, 574; *Schrippenriet v. Bayard*, 1 Pet., 264; *Mulhaell v. Keenan*, 18 Wall., 342.

The promise must be unconditional, and if conditional when made, it is not rendered binding by a subsequent performance of the condition: *N. Y.*, etc., *v. Gibson*, 5 Duer, 574.

See *Read v. Wilkinson*, 8 Wash. C. C. R., 514.

Under the statute, an acceptance of a bill of exchange is not obligatory unless it is in writing, signed by the acceptor or his agent; and if it be written on a paper other than the bill, it does not bind the acceptor unless the fact of acceptance be disclosed to the person taking the bill, and he receive it for a valuable consideration; the statute is complied with if the fact of acceptance comes to the knowledge of the person taking the bill, whether such knowledge be derived from actual inspection of the acceptance, or from written or oral information: *Bank v. Ely*, 17 Wend., 508.

Discounting a bill in the expectation that it will be accepted as previous similar bills had been, is not discount-

ing it on the faith of an acceptance: *Farmers, etc., v. Empire, etc.*, 10 Abb. Rep., 47.

An instrument in the following form, viz:—

"\$500. Columbus, March 1st, 1858.

"Messrs. John Steward, Jr., & Co.: Please pay to the order of Archibald H. Lowery the sum of five hundred dollars, on account of 24 bales cotton, shipped to you as per bill lading by steamer *Colorado*, inclosed to you in letter.

Strippleman & Boyce."

is a bill of exchange.

An unconditional order upon A. to pay a sum certain to the order of a person therein named, is none the less a bill of exchange because it specifies the account which forms the consideration of the other.

In the State of New York, the drawee of such an order is not liable as acceptor of a bill of exchange if he have not accepted the same in writing.

A letter written to the drawers of the draft above described, assuring them that such draft shall be honored from the proceeds of the cotton, does not make the drawees liable as acceptors of a bill of exchange to the payee, to whom it was subsequently remitted in payment of a debt due by the drawers to him.

But where a shipment of cotton is made to J. S. & Co., and the bill of lading is forwarded to them in a letter advising them of the shipment, and also advising them that a draft has been drawn on them for \$500 in favor of A. H. L., payable when the cotton is sold; and thereupon the drawees and consignees by letter promise the drawers that the draft shall be paid out of the proceeds of the cotton, and on application of A. H. L., the same promise is verbally made to him, and such cotton is sold and the proceeds exceed the amount of the draft, the drawees are liable without any formal acceptance for the amount of the draft to A. H. L., although the drawees in such case may have a right to require the production and presentation of the draft by A. H. L.; yet mere delay in its presentation will not justify them in appropriating the proceeds of the cotton to other uses, even with the consent of the consignors by whom the draft is drawn.

By accepting the consignment and

promising to apply its proceeds to the payment of the draft, they became trustees in respect to such proceeds and bound to account to A. H. L., and the consent of the drawees will not justify a different appropriation of the fund: *Lowery v. Steward, 8 Bosw., 506*, affirmed 25 N. Y., 323.

§ 9. Every holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill. A refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance.

§ 10. The four last sections shall not be construed to impair the right of any person, to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise, on his refusal to accept such promise.

Under section 10, no action can be maintained to recover damages for the

refusal to accept a bill except by the person to whom the drawee had promised to accept it, and who upon the faith of such promise had drawn or negotiated the bill: N. Y., etc., v. Gibson, 5 Duer, 574.

§ 11. Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or shall refuse for twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted, or unaccepted, to the holder, shall be deemed to have accepted the same.

This section only applies to cases in which the acts of the drawee are of a tortious character, and simply an unauthorized conversion of the bill by the drawee, and not to cases in which the bill is willingly left in the hands of the drawer by the holder and no demand therefor is made: *Matteson v. Moulton*, 11 Hun, 268, 79 N. Y., 627.

[5 Appeal Cases, 820.]

H.L. (Sc.), July 12, 1880.

[HOUSE OF LORDS.]

820] *WILLIAM DIXON, Limited, and Others, *Appellants*; CALEDONIAN and GLASGOW and SOUTH WESTERN RAILWAY COMPANIES, *Respondents* (*).

Railway—Mines and Minerals—Statutory Notice to purchase by Railway Company—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 83), ss. 70, 71, 72.

Though a mine-owner may give notice under the statutes 8 & 9 Vict., c. 20, and c. 83, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter-notice. They can stop the working at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals they desire left standing.

By the 70th section of the Railways Clauses (Scotland) Act, 1845, the minerals under a railway remain the property of the owner of the land, unless they are expressly purchased by the company.

The 71st section provides that if the owner or lessee of minerals not purchased by the company is desirous of working them, he shall give the company notice in writing of his intention to do so thirty days before the commencement of working. 821] Power is given to the company "on the receipt *of such notice" to inspect the mines, and if they are desirous that such mine or parts thereof should be left unworked, and if they are willing to make compensation therefor, they are empowered

(*) Affirming 17 Scot. L. Repr., 102; Ct. Sess. Cas., 4th Series, vol. vii, p. 216.

to give notice to that effect. If such notice is given, then it is declared that the owner or lessee shall not work the mines or minerals comprised in such notice.

The 72d section provides that if before the expiration of such thirty days the railway company do not give notice of their desire to have such mines left unworked, it shall be lawful for the owner or lessee to work the said mines in such manner as such owner or lessee shall think fit for the purpose of getting the minerals contained therein.

A. and B. were the lessees of the minerals, viz., limestone, under a railway passing through Caldwell. They, on the 8th of July, 1878, gave notice in terms of the above sections to the proprietors of the railway that they were desirous of working, and intended to work, the "mines and minerals including limestone" lying under the railway. The proprietors of the railway did not, before the expiration of thirty days, give notice to A. and B. of their desire to have such mines and minerals left unworked, but they did give such notice on the 20th of February, 1879, offering compensation for the limestone unworked. A. and B. contended that the notice of the 20th of February, 1879, was too late to prevent them working out the limestone; such notice to be valid required to be given before the expiration of thirty days from the date of their notice of the 8th of July, 1878:

Held, affirming the decision of the court below, that the notice of the railway proprietors was valid.

Held, also, that the incidental *dictum*—that after thirty days had expired the time had passed for the railway proprietors to give a counter-notice—in *Smith v. Great Western Railway Company* (3 App. Cas., at p. 182) was no judicial authority here, being said where it was in no way material for the decision, and where the point could not have been fully argued; no counter-notice having been given in that case.

APPEAL from a judgment of the Second Division of the Court of Session.

The appellants, William Dixon, Limited, are the lessees of certain minerals, viz., limestone rock, on the estate of Caldwell Renfrewshire, under lease dated Whitsuntide, 1870. The respondents, the Caledonian and Glasgow, and South Western Railway Companies, are the joint proprietors of the Beith Branch Railway, which passes through the estate of Caldwell. The respondents purchased in 1866 the land occupied by the railway so far as passing through the estate; but the mines and minerals were not expressly purchased by them. The question in this appeal arises mainly under the 70th, 71st, and 72d sections (1) of the Railways *Clauses Consolidation (Scotland) Act, 1845, which [822 are substantially as follows:

(70.) The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, . . . unless the same shall have been expressly purchased, &c.

(71.) If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee,

(1) Substantially the same as the 77th, 78th and 79th sections in the English statute, 8 & 9 Vict. c. 20.

or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines or any parts thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works or within the distance aforesaid which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, . . . and if the company, and such owner, lessee or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

(72.) If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein; and if any damage or obstruction be occasioned to the railway or works by the working or getting of any such minerals which the company shall so have required to be left unworked, and for which they shall so have agreed to make compensation, the same shall be forthwith repaired or removed, as the case may require, &c.

Some years ago the appellants commenced to work the Caldwell limestone; and in March, 1877, their workings reached to within forty yards of the respondents' railway. After verbal communings it was agreed by the respondents, by letter dated the 2d of May, 1877, to allow the limestone to be "worked up to within ten feet of the centre of the line of rails," adding, "that when the working came up to that

point both parties will see *clearly the exact position [823 of matters, and be better able to decide as to future operations." Under this arrangement the work proceeded until the month of June, 1878, in the course of which month the appellants' workings had at one or more points been carried up to within ten feet of the centre of the railway.

The appellants, under their lease, have right to work the limestone either by open cast works or by mines, and for some years they have been in the practice of working it by the former method. It is alleged that it has always been a question between the parties, whether the appellants were entitled to pursue those open cast workings under and adjacent to the railway, with the result of destroying the surface of the railway.

The appellants, on the one hand, claiming the right to continue their open cast workings without restriction; and the respondents, on the other, disputed this right, contending that the appellants were bound to take to mining near the railway, and leave enough limestone to form a support for the line. The working in some places having approached to within ten feet of the railway, and this question being still unsettled, the respondents, for the purpose of obtaining a judicial decision upon it, presented a note of interdict and suspension (which is not this action) by which they sought to have the appellants interdicted from, *inter alia*, quarrying, by means of open cast workings, any portion of limestone situated under the Beith Branch Railway.

This litigation continued over several months, and was not finally decided until the 11th of February, 1879, in favor of the appellants. But while it was still proceeding the appellants, on the 8th of July, 1878, in terms of the 70th and subsequent sections of the Railways Clauses Consolidation (Scotland) Act, 1845, gave notice to the respondents that they were desirous of working, and intended to work, "the mines and minerals including limestone," lying (as far as concerns this case) under the railway, and intimated that if the respondents did not, within the period of thirty days, give notice that they desired that "such minerals or parts thereof" should be left unworked, and that they were willing to make compensation for such minerals, they (the appellants) would work them out.

The respondents did not give any counter-notice that they *desired the limestone under the railway left, until [824 after the above-mentioned litigation as to the right of the appellants to work by open castings was concluded on the 11th of February, 1879. Being unsuccessful in that action,

they, on the 20th of February, 1879, gave the appellants notice that they desired the limestone under the railway, within certain limits therein specified, should be left unworked, and that they were willing to make compensation therefor.

The appellants refused to recognize this notice as a valid or competent statutory notice, on the ground that it had not been given within thirty days from the date of their notice of the 8th of July regarding the same minerals; and therefore that the respondents had, through their own fault, lost their right under the statute to give any such notice at the time they did so.

They, however, expressed their willingness to consider any terms which the respondents might be inclined to offer them as compensation for leaving the minerals. The respondents refused to submit any offer, except on the basis of their notice of the 20th of February being treated as a valid and subsisting notice under the statute; and in order to prevent the appellants proceeding with their workings, and to try the question of the validity of the notice of the 20th of February, 1879, the respondents presented the note of suspension and interdict against the appellants, which has given rise to this appeal.

The Lord Ordinary (*) pronounced an interlocutor on the 18th of June, 1879, refusing the interdict sought. Against this decision the respondents reclaimed; and the Lords of the Second Division, on the 13th of November, 1879, recalled the Lord Ordinary's interlocutor, and interdicted the appellants from working certain parts of the minerals lying under and adjacent to the Beith Branch Railway; holding that the notice of the 20th of February, 1879, was effectual; being of opinion that the object and limitation of the thirty days was that the minerals cannot be worked for that period after notice is given; but that after that time the question comes to be one of compensation only, and if the railway company resolve, at any future time, to take the minerals in order to preserve their line, and pay compensation, their [825] notice to *that effect is sufficient to prevent the mineral owner going on working (*).

On appeal,

July 9, 12. Mr. *B. B. Kay*, Q.C., and Mr. *Chitty*, Q.C., contended for the appellants that the meaning of the limit of thirty days in the 72d section of the statute was that if the railway proprietors did not give a notice within that time

(*) Lord Adam.

(*) 17 Scot. Law Rep., 102; Court of Sess. Cas., 4th Series, vol. vii, p. 216.

that they desired the minerals unworked, then the appellants had a positive liberty to work the minerals, just as if the railway was never made. This interpretation threw no hardship on the railway proprietors, for having neglected to give a counter-notice, they now either would have to deal with the mineral owner without compulsory power of purchase, or deviate their line.

The appellants' notice admittedly did set out their intention to work the "mines and minerals, including limestone," under the railway, though they had only the right to the limestone; but no question had been raised in the court below as to the notice not being sufficiently clear, and therefore that point could not now be raised. This was a case of sale by compulsory compensation, and therefore must be construed strictly as to time within which it could be done: see *Brooke v. Garrod* (').

They further relied on the dictum of Lord Cairns in *Smith v. Great Western Railway Company* ('); although that dictum was not necessary for the decision of that case it was a strong authority. Lord Cairns there said that if "Mr. Smith's notice was to be held a good notice entitling him to work as to the ironstone, the time had passed for the railway directors to give a counter-notice, and he would be entitled, whether they were willing to compensate him or not, now to work the ironstone."

Their further argument fully appears from the opinions of the Law Peers.

[They cited *Wyrley and Essington Canal v. Bradley* ('); *Dudley Canal Navigation v. Grazebrook* ('); *Stourbridge Navigation v. Earl of Dudley* ('); *Great Western Railway Company v. Fletcher* ('); **Birmingham Canal Company v. Earl of Dudley*, affirming *Birmingham Canal Company v. Swindell* (').]

Mr. Benjamin, Q.C., and Mr. Mackintosh (of the Scotch bar), appeared for the respondents, but were not called on.

LORD SELBORNE, L.C.: My Lords, the Second Division of the Court of Session in this case have held that the railway company is not placed by the Railways Clauses Consolidation (Scotland) Act, 1845, in the position of having thirty days after the receipt of a notice from a mine-owner and no more, within which to make up their minds whether they will give a counter-notice to prevent the working of the

(') 2 De G. & J., 62.

(*) 1 B. & Ad., 59.

(') 3 App. Cas. 165, at p. 182; 24 Eng.

(*) 3 E. & E., 409; 30 L. J. (Q.B.),

R., 95.

108.

(') 7 East, 363.

(*) 5 H. & N., 689.

(') 7 H. & N., 969, at p. 980.

minerals under the railway and for a certain distance from it upon the terms of compensation provided by the act.

There appears to be no authority upon this subject, unless it be a *dictum* which incidentally fell from the late Lord Chancellor in this House in the case of *Smith v. Great Western Railway Company*(¹). Undoubtedly, the Lord Chancellor did in that case, in which no counter-notice had been given, and when the question did really not arise, and was in no way material to the decision, say this: "There is no doubt that when Mr. Smith gave his notice to the directors of his intention to work, he stated to them that he intended to work both coal and ironstone, and if that notice was to be held a good notice entitling him to work as to the ironstone, the time has passed for the railway directors to give a counter-notice, and he would be entitled, whether they were willing to compensate him or not, now to work the ironstone."

Your Lordships will, I am sure, feel great respect for any *dictum*, even when unnecessary for the purpose of the decision of the particular case with reference to which it was said, which fell from so eminent a judge: at the same time I feel perfectly sure that that very learned judge would be the first to maintain that a *dictum* of that kind is not to be confounded with a judicial authority, when the question cannot have been presented in argument in the manner in which it would have been if it had been the real point to be decided. At the most it indicates the *prima facie* impression of a very eminent and learned judge which certainly, so far as it goes, is favorable to the argument of the appellants in this case. On the other hand we have the well-considered and deliberate opinion of three learned judges since expressed in the Second Division of the Court of Session in Scotland upon the argument of the particular question as arising in this case, and that opinion differs from the view so incidentally expressed by the late Lord Chancellor.

In this case your Lordships have had the assistance of an extremely full and able argument in support of the view which the Second Division thought erroneous, and I believe all your Lordships are of opinion that the result of the careful examination of the act of Parliament which has now taken place, is not to displace, but to confirm, the construction of that act of Parliament adopted by the Second Division.

The matter, shortly stated, seems to stand thus:—This and all other railways made under acts of Parliament are made, not only, perhaps I may say not principally, for the

(¹) 3 App. Cas. 163, at p. 182; 24 Eng. R., 95.

private benefit of the shareholders, but for the public benefit as furnishing lines of traffic which, from the time when the railway is made, the public have a right to use. You must, therefore, consider that in any provisions such as those now to be construed in such acts the public interest and the private interest are impartially and justly regarded upon the one side and upon the other; and if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction, or strongly against a private person on another construction, it is I think consistent with all sound principles to pay regard to that balance of inconvenience in determining such a doubtful question of construction. Here it does appear to me that the inconvenience to the public and to the railway company (if the railway company is to be regarded apart from the public) would be most serious if, through any inadvertence, or misconception, or from any other cause consistent with good faith, the thirty days had been permitted to elapse, and if that lapse of thirty days were held upon the construction of the act to be fatal to the power of the railway company to save the railway from destruction by afterwards acquiring the right to stop the working of subjacent minerals. On the other hand, it appears to me that no injustice, and no serious inconvenience, would occur to the mine-owner if he is liable to be stopped at any time, before the mine has been actually worked, upon the terms provided by the act of full compensation being made for the minerals which are to be left unworked, and for all loss or damage occasioned by the non-working thereof, that compensation to be settled as in other cases of disputed compensation. In the one case the full equivalent for the value of the property of the use of which he is deprived is to be given to the mine-owner; in the other case, the railway company and the public represented by the railway company are left entirely at the mine-owner's mercy, who, if he pleases to abuse his extreme rights in an extreme manner, on that view of the case would be at liberty absolutely to destroy the railway in a manner which, possibly, might be irremediable, or if remediable at all might be remediable only after great difficulty and after a considerable lapse of time. Or, on the other hand, he might demand any terms, however extortionate, which it could possibly be worth the while of the railway company to consent to, in order to avoid the destruction of the line. If the language of the clauses is such as to justify your Lordships at all in looking at the consequences, I do not

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think you can hesitate to say that the balance of the considerations depending upon reason and convenience would be against any construction in *re ambigua* which would expose the railway company to those consequences ; while, on the other hand, in any event full provision seems to be made for doing justice to the mine-owner.

My Lords, I have stated this in the outset, not by any means as supposing that those considerations would have a legitimate place in your Lordships' decision if the act of Parliament were clear one way or the other, or if there were no question fairly arising as to its construction. But when I come to look at the terms of this act, it does appear to me that the burden of proof is by the peculiar structure and language of these clauses thrown upon the mine-owner rather 829] than upon the railway company, to make out *that the Legislature has so ruled the case in his favor as to place the railway company and the public entirely at his mercy. For the scheme of these three clauses is this:—The first clause, section 70, says that an ordinary conveyance of land for the purposes of the railway shall not be held to carry with it to the railway company a right to subjacent mines and minerals unless the same shall have been expressly purchased. I need not more particularly refer to that, and I will only add that as I understand that clause and the next there would be nothing in those sections, if they stood alone, to deprive a railway company, purchasing the surface from the owner of the land, of the ordinary right to support from the subjacent strata, though those subjacent strata were reserved and excepted in favor of the landowner. The 71st section, it is admitted, would, if it stood alone, have no other effect than this, that the mine-owner before he proceeds to work any mines or minerals under the railway, or within a prescribed distance, or, if there is no prescribed distance, within forty yards from the centre line of the railway, is required to give notice of his intention to work those minerals, and if he gives that notice the company is at liberty to give a counter-notice specifying "the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked, and for which they shall be willing to make compensation;" and if that is done the owner, lessee, or occupier is not to "work or get the mines or minerals comprised in such notice," but compensation is to be made for them as is before stated.

That clause beyond all question introduces a definition of time, but it does so for the purpose simply of determining how long the mine-owner's right of working shall be kept

in abeyance or suspense. And it is important, my Lords, to observe that the manner in which it reckons time is such as is apt and appropriate for that purpose and not apt or appropriate for the opposite purpose of putting the company under the obligation of doing something within a definite period. If a notice is given, and time is to be reckoned from the date of the notice, that is an apt and reasonable mode of defining the period within which something is to be done by the person receiving the notice. But if a notice is to be *given not less than a certain time before something is to be done by the person giving the notice, that is plainly apt for the purpose of suspending his power to do that act until the notice shall have been given for that period; but it does not fix a *terminus a quo* convenient for the reckoning of a time within which something is to be done by the person receiving the notice. That mode, therefore, of computing time, on the face of it indicates that the object which the Legislature had in view was to fix the period during which the right of the mine-owner is to be in suspense, and not the period within which some act is to be done by the railway company.

If it had been intended to fix the time within which the railway company must necessarily give notice or be forever precluded from doing so, the natural place for fixing that time would have been in that part of the 71st section where the right to give the counter-notice is conferred upon the railway company. It would naturally have run thus:—"If the company be desirous that such mines, or any part thereof, shall be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they may desire to be left unworked, they shall within thirty days after the receipt of such notice, give notice to the owner, lessee, or occupier, &c." That is the manner in which you would have expected to find such an enactment, if it was the intention of the Legislature to put them under those terms. But neither in the 71st section, nor in the introductory part of the 72d section, to which I shall presently advert, do we find any such period mentioned as thirty days after the receipt of that notice. It is not mentioned in any portion of those clauses, nor in this, which is the governing clause, as to the right of the railway company to give notice, is any time whatever fixed within which such notice must necessarily be given.

But it is said by the appellants that you must infer that the notice is to be given, if at all, within thirty days, which must mean thirty days from the receipt of the notice,

although no such period of time at all had been mentioned in the 71st section, or is mentioned in the 72d. They say you must infer that this counter-notice of the company must be given within thirty days from the receipt of the notice, 831] because the 72d section is introduced *by these words: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier to work the said mines." I omit the rest for the present, though I shall have some observations to make upon it presently. Those words are perfectly consistent, sensible, and efficacious if they are understood to have only the same motive and purpose with the corresponding mention of thirty days before the commencement of the working, which we have at the beginning of the 71st section. As those words in the 71st section require a notice which is to precede the working by thirty days, so this says that when such thirty days have expired and no new notice, no counter-notice, has been given, then the suspense or abeyance of working is to come to an end, and the mine-owner will be entitled to act upon his ordinary right, as an owner of mines, to work them. My Lords, it is not true, as was suggested, that this clause if so construed is inofficious; because that which it says it shall be lawful for the owner after the thirty days to do, is to work the mines "in such manner as he shall think fit for the purpose of getting the minerals contained therein." The words which follow show that he may work the mines without any regard to the support of the railway and the railway works by the subjacent strata. It therefore is a clause which has the most important office of taking away that right to support, which, if there had been nothing said in that section, would have remained. So construed, effect is given to every word in the clause; more effect I should say to the words, "such thirty days," which still mean thirty days before the commencement of the working, than would be given by any other construction; and no kind of necessity arises by implication or otherwise for limiting, in a manner in which clause 71 has not limited it, the time within which the company's counter-notice shall be given.

I omitted to mention the words which are interjected after "to work the said mines," namely, "or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation." If

we had found the words "to work *the said mines" [832 without the addition of those later words, it might possibly have been argued that their meaning was that it shall be lawful, not merely to begin working, but to go on working, and to work out the whole of the mines, though that would have been hardly possible, considering the power to give partial as well as complete notice previously provided for. But then the power "to work the said mines" is qualified by the addition of the words "or such parts thereof for which the company shall not have agreed to pay compensation." It is manifest that, whichever way the clauses are construed as to this limit of thirty days, those words are sensible. If the company have only thirty days to give their notice in, of course their agreement to pay compensation for any particular parts must have been within the thirty days; but if the company are not limited (as by the 71st section they are not limited) to the thirty days, then those words would still be perfectly sensible; because if they have exercised the power of giving the notice under the 71st section at any time whatever as to mines not at that time already worked by the mine-owner, then they will have agreed to pay compensation, and the words "or such parts thereof" will be appropriate;—that is to say, the mine-owner will continue to have the right to work any mines as to which for the time being no notice has been given by the company, but will not have a right to work mines as to which the company shall, according to the true construction of the act, have before that period agreed to pay compensation. The practical result of the whole is this, that after the thirty days have elapsed, the mine-owner may begin to work, and may go on working, and may get all the minerals that he can until he is stopped and intercepted by a notice as to some part of the mine.

Before I conclude I may take notice of the extreme reasonableness of provisions of that sort when we regard the nature of the case, and the kind of questions which are liable to arise in such a case. It is agreed on all hands that the Legislature did not think it desirable that a railway company should be forced to purchase a mine, or a mine-owner to part with a mine, when the acquisition of it by the railway company was not necessary for the support and the safety of the line. It does not appear that the railway company, *even when they have paid compensation, [833 would have any power of working such mines; on the contrary, I should rather infer the reverse. In that state of things it cannot be supposed to have been likely that the

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Legislature should have wished to compel the company to make a premature decision when the means of forming a correct judgment as to what would be necessary for the support of the line might not be available to them. It can hardly be conceived that thirty days would necessarily be sufficient for the purpose, even with the right of inspection that was given. The circumstances of this very case furnish an illustration, because here the notice was given pending a litigation between the company and the mine-owner as to the extent of the rights of mining, and the manner in which those rights might lawfully be exercised in the absence of any notice by the company or by the mine-owner. That litigation was actually going on, and as far as it had proceeded what had been done was in favor of the company's contention, although ultimately, long after this notice was given, and long after the thirty days had elapsed, a different decision was arrived at, and it was determined that the mine-owner, if not stopped by some notice from the company, might proceed by open working in a manner *prima facie* destructive of the surface on which the lines of railway would be laid. That question was surely one which it was reasonable to take into a court of justice at the time, whether it was rightly determined in the result or not; and to say that pending a question of that kind, and a litigation in which, for the time being, no decision adverse to the company had been made, but rather the reverse, the company were bound to enter into a contract, within thirty days or never, to make compensation for the whole of those minerals up to the very surface of the rails themselves, would surely, when we look at the circumstances of the particular case, not be either convenient or reasonable.

And those circumstances were of a kind which might arise in various forms as between mine-owners, generally, and railway companies. There might even be questions as to the right and title of a mine-owner to give any notice at all. There might be questions of many kinds affecting the mines, affecting the company, affecting the mine-owner, questions upon 834] collateral agreements, such as that *which in this case is said to have existed; and the contention upon the part of the appellants is that, although those various questions might, from the nature of the case, exist at the time when a notice of this sort was given, yet still there was a hard and fast line laid down by the Legislature which would place the railway company and the public forever at the mercy of the mine-owner, unless, without waiting for the decision of any such questions, the company bound themselves to purchase

and make compensation for the minerals which it might be necessary to leave unworked. My Lords, I do not think that it would have been a very convenient or very reasonable thing if such had been the law. If the language of the act had been clear that way, we could have done nothing but give effect to it. But those considerations do certainly appear to show that the opposite construction, which the court below has adopted, and which I believe your Lordships will be prepared to affirm, is rational and convenient.

I say nothing about the notice, because it does not seem that the question of the sufficiency of the notice in point of form was made the subject of controversy in the court below. If it had been made the subject of controversy, I own for myself I entertain serious doubt whether the notice itself was one which ought to have been held good. Under those circumstances I move your Lordships to dismiss the appeal with costs.

LORD BLACKBURN: The question, I think, turns entirely upon the construction of three sections, the 70th, 71st, and the 72d of the Railways Clauses Consolidation (Scotland) Act. The 70th section says, in plain and intelligible terms, that "the company shall not be entitled to any mines unless the same shall have been expressly purchased." The effect of that, if it had stood alone, would no doubt, by implication, although it is not expressly said, have been that the mine-owner would have been entitled to work his mines just as if anybody else owned the surface instead of the railway company, and would have been under the same obligations, neither more nor less, to support the surface. But the Legislature obviously thought that, although the company were not to be required to *purchase them in [835 the first instance (and that was, no doubt, a boon to the company), the interests of the public were concerned in the safety of the railway, because life and limb and property would suffer if the railway were to fall down or sink suddenly; and, therefore, they went on to provide that if the owner wished to work the mines within forty yards of the railway, he "shall give to the company notice in writing of his intention so to do thirty days before the commencement of working." That does not in terms say, but it evidently means, that he shall not begin to work them until those thirty days have expired after the notice.

Then comes this clause: "Upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the company that the working of

such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines, or any parts thereof, should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked and for which they shall be willing to make compensation, and in such case such owner, lessee, or occupier shall not work or get the mines or minerals comprised in such notice." Now, stopping there, it is obvious that the notice, as far as the wording of that clause goes, might be given at any time; it does not say that the company, if they make up their minds that they wish to make compensation for those minerals, are to do so within thirty days; it says nothing of the sort. By implication, but by implication only, such a notice would be wholly inoperative after the mine-owner had taken away the minerals. If the railway company were to give the notice then, and say that they were desirous of making compensation for the minerals which the mine-owner had already taken away, that would obviously be too late; but that exception only results from the notice being too late in the very nature of things. Sect. 71 leaves the time within which the counter-notice is to be given without any term or limit at all, except 836] that it must *be before the minerals are taken away. If it had stopped there I think it would have been clear.

But then comes sect. 72, and there are two constructions, either of which may be put upon it. One is the construction put upon it by the Lord Ordinary, who says that he thinks the construction of sect. 72 is that counter-notice may be given within the thirty days, but must not be given later—that the company have thirty days within which they may give it, and no more. If that be right of course the appellants are right.

In favor of that construction reference is made to the only authority upon the subject at all, namely, what the late Lord Chancellor, Earl Cairns, said in the case of *Smith v. Great Western Railway Company* (¹), and there the *dictum* was not relevant. He was considering whether a notice to take coal and iron, when the man who gave the notice had no right at all to the coal, but had a right to the ironstone, was a good notice or not, and in thinking about and de-

(¹) 3 App. Cas., 165; 24 Eng. R., 95.

termining that, he said that the time which had elapsed in consequence of the litigation about the coal in which the company proved to be in the right, being more than the thirty days, the time would have gone; if this notice to take the ironstone was a good notice it was too late for the company to give a counter-notice. Now it would have been quite as good, for the purpose of the argument he was then putting, if the late Lord Chancellor had said there would have been a grave doubt whether the notice then given would have been in time or not, and I do not think it can fairly be said that he paid more attention to it than to be satisfied that there was grave doubt on the point. Looking at the section without having heard the point argued, his view at the first blush was that he thought that it did mean within the thirty days. That is an authority, and an authority of course which one does not act against without consideration; but it is not a decision at all, and I do not think it would be at all binding upon the late Lord Chancellor, Earl Cairns, if he were here. He would say, Upon hearing of the argument I will consider whether that was right. I did say it at the moment without having heard it argued, and I consider my mind quite free to look at it one way or the other now. Still I do not mean to say it is not an authority, [837 and that the learned counsel for the appellants were not perfectly justified in pressing it.

For all that, however, I think, looking at the construction of sect. 72, the fair construction of the words, taking all the circumstances into account, is the other way, and that it means that the mine-owner may, as soon as the thirty days have elapsed, proceed to work, not only (as would have been implied before from the mere fact of the thirty days elapsing) taking due care about the surface, but to work in any manner he pleases. The section proceeds to say that distinctly. But I do not think there is any necessity to imply and interpolate here what is not in terms expressed in sect. 71, that he shall have a right then to work not stoppable by any counter-notice given after the thirty days have expired. The words are: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked" (I will leave out the superfluous words), "it shall be lawful for such owner to work the mines, or such parts thereof for which the company have not agreed to pay compensation, in such manner as he shall think fit." It is not an absurd interpretation to say that that means that he shall have an inde-

think you can hesitate to say that the balance of the considerations depending upon reason and convenience would be against any construction in *re ambigua* which would expose the railway company to those consequences ; while, on the other hand, in any event full provision seems to be made for doing justice to the mine-owner.

My Lords, I have stated this in the outset, not by any means as supposing that those considerations would have a legitimate place in your Lordships' decision if the act of Parliament were clear one way or the other, or if there were no question fairly arising as to its construction. But when I come to look at the terms of this act, it does appear to me that the burden of proof is by the peculiar structure and language of these clauses thrown upon the mine-owner rather 829] than upon the railway company, to make out *that the Legislature has so ruled the case in his favor as to place the railway company and the public entirely at his mercy. For the scheme of these three clauses is this:—The first clause, section 70, says that an ordinary conveyance of land for the purposes of the railway shall not be held to carry with it to the railway company a right to subjacent mines and minerals unless the same shall have been expressly purchased. I need not more particularly refer to that, and I will only add that as I understand that clause and the next there would be nothing in those sections, if they stood alone, to deprive a railway company, purchasing the surface from the owner of the land, of the ordinary right to support from the subjacent strata, though those subjacent strata were reserved and excepted in favor of the landowner. The 71st section, it is admitted, would, if it stood alone, have no other effect than this, that the mine-owner before he proceeds to work any mines or minerals under the railway, or within a prescribed distance, or, if there is no prescribed distance, within forty yards from the centre line of the railway, is required to give notice of his intention to work those minerals, and if he gives that notice the company is at liberty to give a counter-notice specifying "the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked, and for which they shall be willing to make compensation;" and if that is done the owner, lessee, or occupier is not to "work or get the mines or minerals comprised in such notice," but compensation is to be made for them as is before stated.

That clause beyond all question introduces a definition of time, but it does so for the purpose simply of determining how long the mine-owner's right of working shall be kept

in abeyance or suspense. And it is important, my Lords, to observe that the manner in which it reckons time is such as is apt and appropriate for that purpose and not apt or appropriate for the opposite purpose of putting the company under the obligation of doing something within a definite period. If a notice is given, and time is to be reckoned from the date of the notice, that is an apt and reasonable mode of defining the period within which something is to be done by the person receiving the notice. But if a notice is to be *given not less than a certain time before something is to be done by the person giving the notice, that is plainly apt for the purpose of suspending his power to do that act until the notice shall have been given for that period; but it does not fix a *terminus a quo* convenient for the reckoning of a time within which something is to be done by the person receiving the notice. That mode, therefore, of computing time, on the face of it indicates that the object which the Legislature had in view was to fix the period during which the right of the mine-owner is to be in suspense, and not the period within which some act is to be done by the railway company. [830]

If it had been intended to fix the time within which the railway company must necessarily give notice or be forever precluded from doing so, the natural place for fixing that time would have been in that part of the 71st section where the right to give the counter-notice is conferred upon the railway company. It would naturally have run thus:—"If the company be desirous that such mines, or any part thereof, shall be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they may desire to be left unworked, they shall within thirty days after the receipt of such notice, give notice to the owner, lessee, or occupier, &c." That is the manner in which you would have expected to find such an enactment, if it was the intention of the Legislature to put them under those terms. But neither in the 71st section, nor in the introductory part of the 72d section, to which I shall presently advert, do we find any such period mentioned as thirty days after the receipt of that notice. It is not mentioned in any portion of those clauses, nor in this, which is the governing clause, as to the right of the railway company to give notice, is any time whatever fixed within which such notice must necessarily be given.

But it is said by the appellants that you must infer that the notice is to be given, if at all, within thirty days, which must mean thirty days from the receipt of the notice,

although no such period of time at all had been mentioned in the 71st section, or is mentioned in the 72d. They say you must infer that this counter-notice of the company must be given within thirty days from the receipt of the notice, 831] because the 72d section is introduced *by these words: "If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier to work the said mines." I omit the rest for the present, though I shall have some observations to make upon it presently. Those words are perfectly consistent, sensible, and efficacious if they are understood to have only the same motive and purpose with the corresponding mention of thirty days before the commencement of the working, which we have at the beginning of the 71st section. As those words in the 71st section require a notice which is to precede the working by thirty days, so this says that when such thirty days have expired and no new notice, no counter-notice, has been given, then the suspense or abeyance of working is to come to an end, and the mine-owner will be entitled to act upon his ordinary right, as an owner of mines, to work them. My Lords, it is not true, as was suggested, that this clause if so construed is inofficious; because that which it says it shall be lawful for the owner after the thirty days to do, is to work the mines "in such manner as he shall think fit for the purpose of getting the minerals contained therein." The words which follow show that he may work the mines without any regard to the support of the railway and the railway works by the subjacent strata. It therefore is a clause which has the most important office of taking away that right to support, which, if there had been nothing said in that section, would have remained. So construed, effect is given to every word in the clause; more effect I should say to the words, "such thirty days," which still mean thirty days before the commencement of the working, than would be given by any other construction; and no kind of necessity arises by implication or otherwise for limiting, in a manner in which clause 71 has not limited it, the time within which the company's counter-notice shall be given.

I omitted to mention the words which are interjected after "to work the said mines," namely, "or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation." If

we had found the words "to work *the said mines" [832 without the addition of those later words, it might possibly have been argued that their meaning was that it shall be lawful, not merely to begin working, but to go on working, and to work out the whole of the mines, though that would have been hardly possible, considering the power to give partial as well as complete notice previously provided for. But then the power "to work the said mines" is qualified by the addition of the words "or such parts thereof for which the company shall not have agreed to pay compensation." It is manifest that, whichever way the clauses are construed as to this limit of thirty days, those words are sensible. If the company have only thirty days to give their notice in, of course their agreement to pay compensation for any particular parts must have been within the thirty days; but if the company are not limited (as by the 71st section they are not limited) to the thirty days, then those words would still be perfectly sensible; because if they have exercised the power of giving the notice under the 71st section at any time whatever as to mines not at that time already worked by the mine-owner, then they will have agreed to pay compensation, and the words "or such parts thereof" will be appropriate;—that is to say, the mine-owner will continue to have the right to work any mines as to which for the time being no notice has been given by the company, but will not have a right to work mines as to which the company shall, according to the true construction of the act, have before that period agreed to pay compensation. The practical result of the whole is this, that after the thirty days have elapsed, the mine-owner may begin to work, and may go on working, and may get all the minerals that he can until he is stopped and intercepted by a notice as to some part of the mine.

Before I conclude I may take notice of the extreme reasonableness of provisions of that sort when we regard the nature of the case, and the kind of questions which are liable to arise in such a case. It is agreed on all hands that the Legislature did not think it desirable that a railway company should be forced to purchase a mine, or a mine-owner to part with a mine, when the acquisition of it by the railway company was not necessary for the support and the safety of the line. It does not appear that the railway company, *even when they have paid compensation, [833 would have any power of working such mines; on the contrary, I should rather infer the reverse. In that state of things it cannot be supposed to have been likely that the

Legislature should have wished to compel the company to make a premature decision when the means of forming a correct judgment as to what would be necessary for the support of the line might not be available to them. It can hardly be conceived that thirty days would necessarily be sufficient for the purpose, even with the right of inspection that was given. The circumstances of this very case furnish an illustration, because here the notice was given pending a litigation between the company and the mine-owner as to the extent of the rights of mining, and the manner in which those rights might lawfully be exercised in the absence of any notice by the company or by the mine-owner. That litigation was actually going on, and as far as it had proceeded what had been done was in favor of the company's contention, although ultimately, long after this notice was given, and long after the thirty days had elapsed, a different decision was arrived at, and it was determined that the mine-owner, if not stopped by some notice from the company, might proceed by open working in a manner *prima facie* destructive of the surface on which the lines of railway would be laid. That question was surely one which it was reasonable to take into a court of justice at the time, whether it was rightly determined in the result or not; and to say that pending a question of that kind, and a litigation in which, for the time being, no decision adverse to the company had been made, but rather the reverse, the company were bound to enter into a contract, within thirty days or never, to make compensation for the whole of those minerals up to the very surface of the rails themselves, would surely, when we look at the circumstances of the particular case, not be either convenient or reasonable.

And those circumstances were of a kind which might arise in various forms as between mine-owners, generally, and railway companies. There might even be questions as to the right and title of a mine-owner to give any notice at all. There might be questions of many kinds affecting the mines, affecting the company, affecting the mine-owner, questions upon [834] collateral agreements, such as that *which in this case is said to have existed; and the contention upon the part of the appellants is that, although those various questions might, from the nature of the case, exist at the time when a notice of this sort was given, yet still there was a hard and fast line laid down by the Legislature which would place the railway company and the public forever at the mercy of the mine-owner, unless, without waiting for the decision of any such questions, the company bound themselves to purchase

and make compensation for the minerals which it might be necessary to leave unworked. My Lords, I do not think that it would have been a very convenient or very reasonable thing if such had been the law. If the language of the act had been clear that way, we could have done nothing but give effect to it. But those considerations do certainly appear to show that the opposite construction, which the court below has adopted, and which I believe your Lordships will be prepared to affirm, is rational and convenient.

I say nothing about the notice, because it does not seem that the question of the sufficiency of the notice in point of form was made the subject of controversy in the court below. If it had been made the subject of controversy, I own for myself I entertain serious doubt whether the notice itself was one which ought to have been held good. Under those circumstances I move your Lordships to dismiss the appeal with costs.

LORD BLACKBURN: The question, I think, turns entirely upon the construction of three sections, the 70th, 71st, and the 72d of the Railways Clauses Consolidation (Scotland) Act. The 70th section says, in plain and intelligible terms, that "the company shall not be entitled to any mines unless the same shall have been expressly purchased." The effect of that, if it had stood alone, would no doubt, by implication, although it is not expressly said, have been that the mine-owner would have been entitled to work his mines just as if anybody else owned the surface instead of the railway company, and would have been under the same obligations, neither more nor less, to support the surface. But the Legislature obviously thought that, although the company were not to be required to *purchase them in [835 the first instance (and that was, no doubt, a boon to the company), the interests of the public were concerned in the safety of the railway, because life and limb and property would suffer if the railway were to fall down or sink suddenly; and, therefore, they went on to provide that if the owner wished to work the mines within forty yards of the railway, he "shall give to the company notice in writing of his intention so to do thirty days before the commencement of working." That does not in terms say, but it evidently means, that he shall not begin to work them until those thirty days have expired after the notice.

Then comes this clause: "Upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the company that the working of

ness of supply stores. The chief proprietor, one William Mackness, was the holder of 564 shares, the holdings of shares by some other persons being only of a nominal amount. Among these small shareholders was Mr. Henry Edward Longmore. He was himself a duly registered pharmaceutical chemist, but he appeared also to be a salaried servant of the association, and his especial business was that of superintending the sale of chemicals, which were among the articles sold at the stores.

Certain articles, consisting of poisons, had been bought at the stores, and in respect of the sale of them an action was brought against the association for having infringed the provisions of the 31 & 32 Vict. c. 121 ('). The action was brought in the Bloomsbury County Court, where the question discussed was whether the association, being a corporation, could be made liable under the prohibitory clause of the statute, in which the word "person" alone was used. Mr. George Lake Russell, the learned judge of the county court, had decided that the corporation, as such, was not liable, and that the sale having been, in fact, conducted by 859] Mr. *Longmore, who was a duly registered pharmaceutical chemist, the action was not maintainable. On appeal the Queen's Bench Division overruled this decision and ordered judgment to be entered for the plaintiffs. The appeal court had reversed the decision of the Queen's Bench Division. This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Lumley Smith*, Q.C., for the appellants: The fact that the poisons were actually sold by a duly qualified person did not affect the case. The offence was that of keeping an open shop for the sale of poisons, and that offence, being the one described in the very words of the statute, had been committed by this corporation. The Legislature had desired to secure the best possible protection for the public, and had therefore used

(1) 31 & 32 Vict. c. 121, s. 1: "It shall be unlawful for any person to sell, or keep open shop for retailing or dispensing or compounding poisons, or to assume or use the title chemist and druggist, or chemist or druggist or pharmacist or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this act, or be registered under this act," &c.

Sect. 15: "Any person who shall sell, or keep an open shop for the retailing, dispensing, or compounding poisons, or

who shall take, use, or exhibit the name or title of chemist and druggist or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist and druggist, or who shall take, use, or exhibit the name or title pharmaceutical chemist, pharmacist, or pharmacist, not being a pharmaceutical chemist, &c., shall for every such offence be liable to pay a penalty or sum of £5." And the mode of suing for it was provided.

Sect. 17: "For the purposes of this section, the person on whose behalf any sale is made by any apprentice or servant, shall be deemed to be the seller."

expressions which prevented the exposure for sale of these medical poisons, except by properly qualified persons. The corporation kept the open shop and sold the poisons, and received the profits of the sale, and the corporation was therefore liable to the penalty for that breach of the law, for it was not pretended that a share of the profits was really taken by Mr. Longmore, who was in truth only a salaried assistant at the stores.

That a corporation could be liable in such a case as this was shown by many authorities. It did not matter that the word "corporation" was not used in the statute, the word "person" was sufficient. It was a settled rule of law that the word "person" would include a corporation, Coke's Institutes⁽¹⁾, and that rule had been applied in many cases. It had, indeed, been questioned in argument by Mr. Kindersley in *The Corporation of Newcastle v. The Attorney-General*⁽²⁾. But that doubt was effectually disposed of both by Lord Chancellor Lyndhurst and Lord Cottenham in the same case⁽³⁾. In many cases since then, the word "person" had been treated as including a corporation: *The Mayor of Hereford v. Morton*⁽⁴⁾. The Apothecaries Act (55 Geo. 3, c. 194,) assumed (s. 30) that actions and suits under that act might be brought against "bodies politic, corporate, or collegiate," and it required such suits or actions to be brought within six calendar months. [860] The principle had been applied in cases of civil contracts as well as those of a different sort. Thus in *Altman v. The Royal Aquarian Society*⁽⁵⁾ a society was held liable to an injunction for its manager permitting a breach of an agreement. In *The Queen v. The Great North of England Railway Company*⁽⁶⁾ it was expressly decided that a corporation aggregate may be indicted for a misfeasance. The Legislature itself had recognized that principle of construction, for in the 7 & 8 Geo. 4, c. 28, the 14th sect. enacted that "wherever this or any other statute relating to any offence, whether punishable by indictment or upon summary conviction," in describing the offence shall use the singular number, the words used should be understood to include "bodies corporate as well as individuals." There the words "unless there is something repugnant to such a construction," were added. Those words, which seemed to establish an exception, really made the case here the stronger, for throughout this act there was nothing repugnant to the

(1) 2 Inst., 722.

(2) 12 Cl. & F., 402, at p. 411.

(3) 12 Cl. & F., at 419.

(4) 15 L. T. (N.S.), 187.

(5) 3 Ch. D., 228; 18 Eng. R., 499.

(6) 9 Q. B., 315.

construction now contended for, while the 17th section used words so general as to show that "person" must include both natural persons and persons in law. Private partnerships would undoubtedly be within the mischief of the statute, and this association was really a private partnership, consisting only of a very small number of persons, although, from being registered under the Companies Acts of 1862 and 1867, it assumed the technical form of a corporation. In *Boyd v. The Croydon Railway Company* (1) there was a provision that no action was to be brought against any person for anything done in pursuance of the Croydon Railway Act without a certain notice being given, and it was held that the word "person" included the company, which was therefore entitled to the required notice. So in *Cortis v. The Kent Waterworks Company* (2), where rates were authorized to be made on all and every persons or person who owned or occupied land in the parish, a corporation was held liable to be rated, and, under a section which required a personal demand of the rate, a demand made at a meeting of the corporate body was held sufficient.

The object of this act, which was to secure the public against incompetent persons selling poisonous drugs, would [861] be defeated if *corporations, as such, which must be incompetent to perform such matters, were held not to be within the meaning of the statute.

Mr. *Wills*, Q.C., and Mr. *Finlay*, for the respondents: The whole framework of this act and all its provisions show that "person" here meant individual, and could not be applied to a corporation. There was no doubt that there were instances in which the word "person" used in a statute would mean corporation, but there the nature of the matter dealt with by the statute, and its obvious purpose, would show that that was the intention of the Legislature. Here both reasons were opposed to such a construction. The work to be done could not be done by a corporation—the examinations to qualify for the work could not be gone through by a corporation, and the certificate of fitness and the registration could not be granted to, or made for, a corporation. Every provision in the statute, as had been pointed out in the court below, applied to individuals. Selling the drugs, and not keeping a shop for their sale, constituted the offence, and here the individual who sold the drugs was a qualified person. *Harrison's Case* (3) and *Raynard v. Chace* (4), were referred to and commented on.

(1) 4 Bing. N. C., 669.

(2) 7 B. & C., 314.

(3) Leach's C. C., 166.

(4) 1 Burr., 2.

Mr. Benjamin replied.

THE LORD CHANCELLOR (Lord Selborne): My Lords, I cannot say that this case appears to me to be free from difficulty, especially as we have two courts of high authority differing from each other, the Lord Chief Justice and Mr. Justice Mellor having taken the view of the statute for which the appellants contend, and the Court of Appeal having taken the opposite view.

The question really comes to be one upon the construction of the particular words of the 1st and 15th sections of the statute, having regard to the general principles on which an ambiguous word, such as "person," ought to be construed. There can be no question that the word "person" may, and I should be disposed myself to say *prima facie* does, in a public statute, include a person in law: that is, a corporation, as well as a natural person. *But [862 although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute unless there should be any reason for a contrary construction, it is never to be forgotten, that in its popular sense and ordinary use it does not extend so far. Statutes, like other documents, are constantly conceived according to the popular use of language; and it is certain, that this word is often used in statutes in a sense in which it cannot be intended to extend to a corporation. That accounts for the frequent occurrence in some statutes, in interpretation clauses, of an express declaration that it shall extend to a body politic or corporate; and in others, of which an example was cited during this argument by Mr. Benjamin, I mean the act as to apothecaries, there will be found clauses which say that the remedies of persons who may complain of acts done under color of the authority of the particular act, or in pursuance of it, must be prosecuted within certain limits of time, against all "persons and bodies politic and corporate;" language which appears to treat the word "persons" as not in itself including corporations.

I think the principle laid down by the junior counsel for the respondents was substantially right; that if a statute provides that no person shall do a particular act except on a particular condition, it is, *prima facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called "persons" in law, have no ca-

capacity to do so at any time, by any means, or under any circumstances, whatsoever.

If that be a sound observation, it goes far to decide this case when we look to the language of the 1st and 15th sections. The 1st section (merely transposing the place in which certain words are used) is this:—"From and after the 31st day of December, 1868, it shall be unlawful for any person (unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this act, and be registered under this act) to do certain things." *Prima facie*, that contemplates individual persons, such as 863] *may or may not be pharmaceutical chemists or chemists and druggists within the meaning of the act, and be registered under the act. What kind of persons can be such pharmaceutical chemists or chemists and druggists, and be so registered? Can a corporation, or can it not?

I think it is clear from the sequel of the act that a corporation cannot. A corporation certainly cannot, under the provisions of the Pharmacy Act, be a pharmaceutical chemist. Nor can it be a chemist and druggist "within the meaning of this act," and be registered under this act. The 3d clause says that "chemists and druggists within the meaning of this act shall consist" (amongst others) "of all persons who at any time before the passing of this act have carried on in Great Britain the business of a chemist and druggist, in the keeping of open shop for the compounding of the prescriptions of duly qualified medical practitioners." That indeed might have applied to a corporation, if a corporation could be registered. But, with regard to that class of persons, who had previously carried on such a business, the 5th section requires them to be registered; and, in order to be registered, requires a claim to be made by notice in writing signed by the person, which notice is to be in the form set forth in the schedule. I do not see myself how it is possible to suppose that the Legislature contemplated that any one but a person who could sign the claim in the manner prescribed, was to be registered under those clauses. And, in addition, I find this in the 18th section: "Every person who at the time of the passing of this act is or has been in business on his own account as a chemist and druggist as aforesaid, and who shall be registered as a chemist and druggist, shall be eligible to be elected, and continue a member of the Pharmaceutical Society according to the by-laws thereof." That appears to me plainly to show that the Legislature required and provided for the registration of persons who before the act carried on the business of chem-

ists and druggists, in a sense applicable only to those who could become members of the Pharmaceutical Society; in other words, only to individual persons. With regard to those who might afterwards carry on the business of chemists and druggists, the act requires them to undergo certain examinations, which are necessarily *inapplicable to [864 a corporation. The conclusion, therefore, which I come to is, that these words "unless," and so on, are inapplicable to corporations. This being not a general prohibition of the trade or business, but merely an enactment that it shall be unlawful for any person, unless he complies with certain conditions, to carry on these otherwise lawful trades or businesses (not only keeping a shop for retailing poisons or selling poisons, but also "to assume the title of chemist and druggist, or chemist or druggist"),—I cannot but think it the sounder construction of the word "person" to hold, that only such persons are contemplated as might, by the use of the proper means, comply with the condition, and so be enabled to carry on the trade.

Exactly the same observations occur upon the 15th section. There, again, transposing only some words, we find this description of the class of offenders on whom the penalties in question are imposed. "From and after the 31st day of December, 1868, any person (not being a duly registered pharmaceutical chemist, or chemist and druggist) who shall sell or keep an open shop for the retailing, &c., poisons, or who shall take, &c., the name or title of chemist and druggist, or chemist or druggist;" or (again) "who (not being a pharmaceutical chemist) shall take, use, or exhibit the name or title pharmaceutical chemist, pharmaceutist, or pharmacist," shall be subject to certain penalties. The words follow shortly afterwards; "or who shall compound," &c.; having reference to the particular act of compounding on each occasion on which medicines may be made up; fortifying what I may describe as the individual, I was going to say "personal" construction. The very suggestion of that word exemplifies the difficulty of applying the word "person," in a colloquial and popular sense, to any but individuals.

My Lords, if you look through the act it will be found, that there is only one place where it seems to be necessary to put upon the word "person" a wider sense; and that occurs in a clause which is in several respects contrasted with the rest of the provisions of the act, I mean the 17th section. It begins with a general prohibition in unequivocal terms; not "it shall be unlawful for any person," &c., or "for any

person not coming within a certain definition ;” but “it 865] shall be unlawful to sell,”—unlawful *generally, absolutely, and unequivocally,—“to sell any poison either by wholesale or by retail,” as to which certain precautions are not observed. That form of prohibition is repeated twice. First, as to all poisons whatsoever, and then, four lines afterwards, as to certain particular kinds of poison,—“it shall be unlawful to sell” to any person unknown to the seller, &c. That is a universal prohibition, not qualified by any exception as to any description of person ; though, no doubt, the thing is only made unlawful, if done otherwise than in a certain manner and without the observance of certain conditions. The penalty, also, imposed by that section, is not (like that under the 15th section) a civil debt, to be recovered by a civil form of proceeding or action, though incurred by what is called an “offence” ; but it is a penalty to be recovered “upon a summary conviction before two justices of the peace.” The words are added ; “and, for the purposes of this section, the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller.” The thing being made universally unlawful, “person” must, I think, there include a corporation, if the sale is made by any apprentice or servant on behalf of a corporation. My Lords, it appears to me that the difference in the substance, as well as the phraseology, of that section from the rest, is such as to make it no rule for the construction of the word “person” in other sections of the act.

I have now to consider the main argument of the appellants ; namely, that the act will fail to accomplish its purpose, unless a corporation as well as an individual can be included in these sections. It seems to me, my Lords, that this argument cannot be successfully maintained. The act of selling, the act of compounding, and every other definite and particular act mentioned in the 1st section, and in the sections by which penalties are imposed, are struck at, whether the person who does them is a principal to whom the business belongs, or any one whom he employs to carry on the business. The words, “keep open shop,” may, perhaps, not be so ; upon those words I will make an observation presently. But that the word “sell” is, and that the word “compound” also is, seems to me clear from that very clause, in the 17th section which I just now read ; that “for the purposes of this section, the person on whose behalf 866] any sale is made by any apprentice or servant *shall be deemed to be the seller.” That, if it does not necessarily mean, beyond all doubt naturally implies, that this is a spe-

cial construction for the purpose of that particular section, and that it is not to be extended to sales generally, when mentioned in other sections of the act.

I will add, that regard to the mischief, which beyond all controversy the act was intended to prevent, leads necessarily to the same conclusion; namely, that he who sells, whether he be master or servant, whether he be the principal or a person to whom the conduct and management of sales is delegated, is struck at by the 15th section; because, otherwise, a very wide door would be opened to the evils which the act was intended to guard against. If it were otherwise, nothing more would be necessary, according to the appellants' own argument, than that the business should belong to a person who does not himself carry it on, but who is qualified under the act; and he might be at liberty to employ in the management of his business persons not qualified, by whom the actual sales would be conducted; and then the public would be exposed to all the dangers which the act was passed to prevent. The statute, therefore, in order to be effectual, must strike at the particular acts of those who actually conduct the sales, who actually compound the medicines; and it does strike at those acts. No doubt the words "keep open shop" may extend to something more, and comprehend a person who keeps an open shop for the sale of poison, &c., although he may not with his own hands do the business of selling or compounding medicines; one who is only the master or the proprietor of the business, if he be indeed a "person" within the proper construction of the words of the act. But to say that the construction of the word "person" must be enlarged in order to prevent a corporation from "keeping open shop for retailing poisons," to say that this is necessary for the objects of the act, appears to me to be really begging the question. "Keeping shop" is prohibited, not as a thing apart from, but as a thing involving the particular acts of sale and compounding, &c., within the shop. If a corporation, though it may keep open shop, cannot itself do these particular acts otherwise than by the agency of persons who come within the act; if the particular mischief which the public would suffer from the sale of things which ought not to be sold, and in a manner in which they ought [867 not to be sold, is sufficiently guarded against by the prohibition of such sales, and by the conditions to which they are made subject, the act seems to be strong enough for its purpose whether a corporation, in whose name and for whose profit the shop is kept open, is included or not.

My Lords, I said at the beginning that I did not regard this matter as free from difficulty, but in such a question of construction, it does seem to me to be best to remember the principle, that the liberty of the subject ought not to be held to be abridged any farther than the words of the statute, considered with a proper regard to its objects, may require. It was open to Her Majesty's subjects before this act passed to carry on the business of chemists and druggists, using the title of chemists and druggists for the purpose of that business, and to keep open shop for the sale (amongst other articles) of poisonous drugs, &c. It was perfectly lawful to do that by means of a company incorporated under the Joint Stock Companies Acts, and there is nothing to show that the Legislature had any ground for assuming that there could be no such companies. In point of fact, there was at least one great and leading company of sellers of drugs, or "pharmacopolists," incorporated as long ago as the reign of James I, to whom, by the Apothecaries Act, the Legislature had given large disciplinary powers over other persons carrying on that business, and in whose name (as is admitted) the business of selling drugs had been carried on by their authority, (though not, as it would seem, for their profit,) and continues to be so down to the present time. That having been the state of the law and the facts, I think it would be wrong for your Lordships, without necessity, to impose upon the word "person," used in such a context as that in which you find it here, a construction which might render illegal that mode of carrying on the business of chemists and druggists by such corporations, although there is no direct reference from the beginning of the act to the end to any such bodies, or to that kind of case; more especially when you do find in the act, in the 16th section, a special provision for individuals carrying on that kind of business who might die, and whose executors or trustees, not being themselves qualified, might desire to carry it on after 868] *their deaths. It is true that the Legislature has, in that case, required for the benefit of the public this safeguard, that there shall be an assistant duly qualified; but the Legislature shows that, having that case in view, it was not thought necessarily inconsistent with the object or the policy of the act, that the principals or proprietors of the business, the persons deriving profit from it, to whom those actually selling the drugs would be responsible, might be unqualified persons, provided that there was in the business a duly qualified assistant. It by no means follows that all the drugs would necessarily be sold by that duly qualified

assistant; or that he might not be, as in this case, under the general superintendence of a manager not himself duly qualified; all that is left open. It is, at least, not thought indispensable that the persons carrying on every such business should themselves, without exception, be duly qualified.

If, my Lords, there had not been adequate safeguards against the sale of poisonous drugs in a manner contrary to the provisions of the act by the persons actually carrying on the business for a corporation, then I think the argument would have been extremely strong against corporations being permitted to carry on the business at all; but where you find that there are such safeguards, and that every one whom they employ will be penally answerable, if he sells or compounds poisons or other medicines without having the qualification required by, or without complying with the provisions of, the act, I am unable to conclude that the purposes and objects of the act require a larger construction to be placed upon the word "person" in the 1st and 15th sections than that placed upon it by the Court of Appeal. I therefore advise and move your Lordships that this appeal should be dismissed with costs.

LORD BLACKBURN: My Lords, I am of the same opinion. The question really, I think, when it is cleared of all superfluity, is reduced to a very short point, but I agree that it is one which is not free from difficulty. The difficulty which I feel about the case is not, generally, upon those things which seem to have troubled most of the members of the court below. I own I have no great doubt myself, for instance, that the word "person" may very well [869 include both a natural person, a human being, and an artificial person, a corporation. I think that in an act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a "person" does not include an artificial person, that is to say, a corporation. Nobody in common talk if he were asked, Who is the richest person in London, would answer, The London and North Western Railway Company. The thing is absurd. It is plain that in common conversation and ordinary speech, "a person" would mean a natural person: in technical language it may mean the artificial person: in which way it is used in any particular act, must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person, a corporation, if that is the presumption, is at all a

strong one. Circumstances, and indeed circumstances of a slight nature in the context, might show in which way the word is to be construed in an act of Parliament, whether it is to have the one meaning or the other. I am quite clear about this, that, whenever you can see that the object of the act requires that the word "person" shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the act accordingly.

My Lords, before I go farther I may say that my view of the matter is that it is the question of what the word "person" means in this particular act that gives rise to the whole difficulty in the present case. But I may also say now, in order to avoid coming back to it, that I do not feel the least difficulty arising from what seems to have troubled some of the learned judges in the court below. If this word does include a corporation—I quite agree that a corporation cannot, in one sense, commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is *reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it for a libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case. If you could get over the first difficulty of saying that the word "person" here may be construed to include an artificial person, a corporation, I should not have the least difficulty upon those other grounds which have been suggested.

But, my Lords, my conclusion, looking at this act, is that it is clear to my mind that the word "person" here is so used as to show that it does not include a corporation, and that there is no object or intention of the statute which shows that it is requisite to extend the word to a sense which probably those who used it in legislation, were not thinking of it at all. I do not think that the Legislature was thinking of bodies corporate at all. Beginning with the preamble of the act says, "Whereas it is expedient for the safety of the public that persons keeping open shop for the retailing, dis-

pensing, or compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business." Stopping there it is quite plain that those who used that language were not thinking of corporations. A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself. The metaphysical entity, the legal "person," the corporation, cannot possibly have a competent knowledge. Nor, I think, can a corporation be supposed to be a "person known as a chemist and druggist." The Legislature was not thinking of a corporation at that moment, but said in the preamble that henceforth it was desirable that those who kept open shop for the sale of these drugs, those who were known as chemists and druggists, should have a competent knowledge, and it afterwards appears that the Legislature, those who framed the act, were persuaded by the Pharmaceutical Society (I dare say very rightly) to think that the *best test of [87] having a competent knowledge was that they should be members of that society.

The act then goes on, in the 1st section, which is I think really very important, to say that "it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of 'chemist and druggist,' or chemist or druggist, or pharmacist or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist, or a chemist and druggist." Now, my Lords, standing there, it does seem to me, though without laying down any technical rule, that the plain meaning of the words is, and they are used in this sense—such a person as could become a pharmaceutical chemist. A corporation could not; an individual can. It seems to me, therefore, that the act plainly says in the 1st section, "It shall be unlawful to sell or keep open shop or assume the name of a chemist or druggist for any person," that is to say, any natural person, "unless he becomes a pharmaceutical chemist."

The 15th section imposes a penalty; and the 15th section in imposing the penalty repeats the words which make the thing unlawful. I think those two sections must be construed together and looked at together.

Now, is there anything here in the context, or in the object, to show that we must take that word "person,"

which I think must have been used by those who framed the act, and understood by the Legislature, as meaning a natural person, is there anything requiring us to extend it so that it will apply to a corporate person? I cannot see that there is. If there had been anything in the act throughout, or anything in the nature of things, which made it reasonable that it should be provided that all the profits to be derived from selling poisons or poisonous drugs should be shared amongst those who were pharmaceutical chemists, and that nobody else should meddle with that trade, if there had been anything of that sort, then, in order to carry out that object of the act it would be necessary to say that the word "person" did include a corporation, and not a natural person only. But that object is certainly not avowed upon the face of the act. Whether any of those who promoted the act had or had not such an idea in their minds, I 872] *cannot tell; but they have not brought it forward, or put it in such words as to lead the Legislature to think that they were doing it. And if it had been boldly said: "Bodies corporate and joint stock companies shall not deal in drugs," or, if you like, "in poisonous drugs, unless they have paid black mail to us the Pharmaceutical Society," I think it is exceedingly improbable that the Legislature would have enacted that. At all events they have not said that in distinct terms if they did mean it.

Now, is there anything in the object of the act here which would require that we should so read the act? I quite agree that a body corporate may keep an open shop, and no mischief is done, if for the purpose of conducting the sale of drugs they keep qualified assistants, and if those qualified persons perform or superintend the sale. There I see no harm that can arise. But no doubt the Legislature, for what reason it is for those who passed the act to say, have thought it best to say that a "person," which I take to be a natural person, shall not only not sell, but shall not keep an open shop for the sale. I myself think that probably one reason for that was to facilitate convictions, and another may have been that it was thought if there is a person who keeps a shop, who is unqualified, he may have a qualified assistant, and he will be able to overrule the qualified assistant at any moment he pleases, and there may be danger in that. At all events those would be intelligible motives. But neither of those motives applies in the case of a corporation, for the corporation, the body corporate itself, could not interfere and however much and however little the body

corporate may be unqualified, its being so would not affect the matter at all.

Then, my Lords, comes another objection. It is said, if you put that construction upon it you defeat the act altogether. That I cannot agree to. I hold distinctly that there can be no sale, whether a corporation be the ultimate vendor or not, unless a "person"—meaning a natural person—manages the sale, and that natural person if unqualified would, in my mind, clearly become liable to the penalty under the act; and, although I am not so clear about this, I feel strongly inclined to think that if a corporation, or anybody else, caused an unqualified person to conduct sales, if it could be brought home to them and shown that they *did deliberately cause a person who was unqualified [873 to conduct sales, they would be liable to the penalty under sect. 15, because *qui facit per alium facit per se*. I do not however say that as a certain thing, but I think it necessary to say that, because in the argument it was repeatedly assumed that if "person" was here to be construed natural person, a corporation was out of this act altogether, which is not at all my *ratio decidendi*. I say that a corporation is entirely out of the clause which prohibits persons keeping an open shop, but I do not go farther than that and say anything more.

My Lords, I do not think that there were any other of the sections of the act, or any of the cases cited, or any general legal principle, which requires any notice to be given to them. It seems to me that the case comes round after all to this. Does "person," which may include a corporation, include it here? For the reasons I have given I think it does not. Then is there anything in the context or anything in the object of the Legislature which requires that although the word "person" would not so properly include a corporation, yet in this particular case we should extend it and make it include a corporation? I think there is not in this section. In sect. 17, which has been alluded to, there is sufficient reason for doing so, but in sects. 1 and 15 I think there is not.

Therefore, my Lords, I agree in the motion which has been made by the noble and learned Lord on the woolsack.

LORD WATSON: My Lords, it is impossible to disguise the fact that this statute is characterized by great ambiguity, and I would almost go the length of saying, confusion of language. That probably arises from the circumstance that the framers of this act were dealing with two separate matters; the one, the improvement of a society called the Phar-

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maceutical Society, and the other the regulation of the sale of poisons generally throughout Great Britain. That society had existed from 1843, when it was incorporated by a Royal Charter for the avowed purpose of "advancing chemistry and pharmacy, and promoting an uniform system of educating those who should practice the same," and also for the protection of those who carry on the business of chemists and druggists. In the year *1852, the Legislature, by the statute 15 & 16 Vict. c. 56, made various improvements in the constitution of the body upon a recital that it was "expedient to prevent ignorant and incompetent persons from assuming the title of or pretending to be pharmaceutical chemists or pharmacutists in Great Britain."

But when you come to the act of 1868, the act with which we are dealing, you not only have farther improvements made in the character of the body and its constitution, but you have very important changes made in the position and the privilege accorded to their body by statute. Down to 1852, and subsequently to 1852, they had no special privilege—nothing in the nature of monopoly or exclusive privilege—and the act of that year was simply intended, not to prevent other persons from dealing in drugs of any description, but to prevent other persons, when dealing in drugs, from assuming the title to which the members of the society alone were entitled. But when you come to the act of 1868, the provisions of that statute undoubtedly give to the members of the Pharmaceutical Society the sole right to sell drugs, as individuals, or to keep open shops for the sale of poisonous drugs, as individuals, because all individuals who are not possessed of the qualification of membership of the society, or who have not passed the requisite examination and have their names upon the register, are prohibited under penalties from dealing by retail in those articles.

Now, my Lords, I must say that when I come to deal with what is called the intention of the Legislature, I say it with all respect, I find the greatest possible difficulty in making up my mind as to what it should be held to be. I think that the considerations of policy on either side are pretty evenly balanced—in fact, I should be almost inclined to hold that the considerations of policy rather preponderate in favor of the appellants' argument. But that is not enough. It is not enough for me to speculate as to what was in the mind of the framer of this statute, whether he had forgotten the fact that there were corporations which either were dealing or might deal in poisonous drugs; or whether, having this

in view, he framed this act for the purpose of subjecting them to certain disabilities.

I can only look, my Lords, at the language which the Legislature has employed in the enacting sections, sections 1 and 15, and *I can only say this, that even if I was [875 satisfied that it had been the intention of the framer of these two sections to give to individuals registered under the act, the exclusive privilege of selling poisonous drugs by retail, and to impose penalties on corporations keeping open shop for that purpose, I must say I come to this conclusion that it would have been a very simple thing for the Legislature to have said so in express terms, and I, for my own part, am quite satisfied, apart from those considerations which have led your Lordships to put another construction on the terms of the statute, that the framer of it, if that was his intention, has entirely failed to use language adequate for the purpose he intended to attain.

Judgment under appeal affirmed, and appeal dismissed with costs.

Lords' Journals, 22d July, 1880.

Solicitors for appellants: *Flux, Slade & Co.*

Solicitors for respondents: *Crouch & Spencer.*

See 28 Eng. R., 783 note.

A corporation is a person within the statute of New York (1 R. S., 768, § 3,) as to the giving of notes: *McCallough v. Moss*, 5 Den., 567, 577.

But not under a statute giving a local court in cases where any of the defendants shall reside, or be personally served with the summons within

said city: *Davidsburgh v. Knickerbocker Life*, 90 N. Y., 526; *Braunack v. Knickerbocker Life*, 1 Abb. N. C., 393.

The United States is a person within a statute, forbidding the cutting of timber of "another person": *State v. Herold*, 9 Kans., 194.

[5 Appeal Cases, 876.]

H.L. (E.), June 29; July 1, 2, 23, 1880.

[HOUSE OF LORDS.]

*THE STOOMVAART MAATSCHAPPY NEDERLAND, *Ap-* [876
pellants; and THE DIRECTORS, &C., OF THE PENINSULAR
AND ORIENTAL STEAM NAVIGATION COMPANY, *Respon-*
dents.

[THE VOORWAARTS. THE KHEDIVE.]

Regulations for Preventing Collisions at Sea—36 & 37 Vict. c. 85, s. 17.

The "Regulations for Preventing Collisions at Sea," made under the authority of the Merchant Shipping Acts, 1854 to 1873, must, under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance.

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The K. and the V., two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The K. alleged that when the two vessels were fast approaching each other the V. improperly changed its course; that the master of the K. could not rely on the V. taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the regulations, which directed that in such a case the engines should be stopped and reversed. The Court of Admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the Court of Appeal had held the master of the K. to be excused under the circumstances of the case, and had given judgment against the V. On appeal to this House:

Held, that the statutes and the regulations had not left the master of the K. a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger, he had disregarded the regulations, and consequently that the K. must be held in part responsible.

The judgment of the Court of Admiralty was restored.

THIS was an appeal against a decision of the Court of Appeal which had varied a previous decision of the Court of Admiralty. The appellants were the owners of the steamship, the Voorwaarts, the respondents were the owners of 877] another steamship, the Khedive. *The Voorwaarts was a screw steamship of about 3000 tons register, the Khedive was a screw steamer of about 3740 tons register. The question related to the liability of the owners of one or the other vessel in respect of a collision between them, which occurred on the 23d of March, 1878, off Muka Head, in the island of Penang. The evidence was, as usual, of a contradictory character as to the original cause of the mischief, but the general effect was that while both vessels were approaching each other nearly on opposite lines or courses, a fault in steering was committed, the Khedive laying the blame on the Voorwaarts, and the Voorwaarts insisting that the Khedive was in fault. Each seemed to be in doubt as to the movements of the other, and when the two vessels were in dangerous proximity the master of the Khedive ordered his engineers to stand to their engines, then starboarded the helm, and then stopped and reversed the engines; immediately after which the collision occurred. The facts are stated in detail in the judgment of Lord Blackburn. The Court of Admiralty had treated both vessels as having been in fault, and judgment was given in accordance with that view under the provisions of the 36 & 37 Vict. c. 85, s. 17. On cross appeals the case was heard before Lord Justices James, Brett, and Cotton, and after time taken to consider, Lord Justice Brett delivered the judgment of the court to the effect that the danger of collision had been brought about, in the first instance, by the negligence of those on

board the *Voorwaarts*, and that the finding of the Court of Appeal on full consideration of the evidence was that the master of the *Khedive* ought, on seeing the danger of collision, at once to have stopped and reversed his engines, whereas he did not do so for an appreciable time (only ordering the engineers to stand by the engines) and that he thereby broke the rule of navigation contained in the 16th article, but that such a finding was not conclusive, and the court therefore asked the assessors the following question: "If this order which he gave was not absolutely right under the circumstances, was it such an order as a captain of ordinary care, skill, and nerve might be fairly, as a seaman, excused for giving under the circumstances in which the captain was placed?" This question was answered by the assessors in the affirmative. The Court of Appeal then expressed the *opinion that the *Khedive* was not in any [878 way in fault for the collision for which the *Voorwaarts*, having made the original mistake, was solely liable. The judgment of the Court of Admiralty was therefore varied, and judgment was given against the *Voorwaarts*. Hence this appeal.

The appellants now relied on the 36 & 37 Vict. c. 85, s. 17, which is in these words: "If, in any case of collision, it is proved to the court before which the case is tried, that any regulation for preventing collisions, contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulations has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." The appellants contended that the master of the *Khedive* had disregarded the regulations made under the authority of the statutes for preventing collisions at sea.

The 13th Article was in these terms: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

Art. 14: "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other."

Art. 16: "Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

Art. 19: "In obeying and construing these rules due regard must be had to all dangers of navigation; and due re-

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gard must also be had to any special circumstances which may arise in any particular case rendering a departure from the above rules necessary in order to avoid any immediate danger."

The *Solicitor-General* (Sir Farrer Herschell), and Mr. *Milward*, Q.C. (Mr. *Webster*, Q.C., and Dr. *Phillimore*, were with them), for the appellants, denied that the evidence showed the *Voorwaarts* to have been originally in fault, but even assuming that to be the case, it was quite clear that the collision itself had been occasioned by the *Khediye* not [879] strictly observing the regulations and stopping *and reversing. Instead of that, the helm of that vessel had been starboarded when the two vessels were very near each other, and the collision had been the consequence of that error. The Regulations for Preventing Collisions had not been observed, and there was not here, within the terms of the 36 & 37 Vict. c. 85, s. 17, sufficient to show to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary: *The Hibernia* ⁽¹⁾; *The Fanny Carroll* ⁽²⁾.

Mr. *C. P. Butt*, Q.C., and Mr. *Watkin Williams*, Q.C. (Mr. *E. C. Clarkson* was with them), for the respondents, contended that the evidence showed that the *Voorwaarts* had committed the original error, had not kept a good look-out, and at the last had pursued so doubtful a course as to leave the master of the *Khediye* uncertain what to do, and he had therefore done the best in his power by ordering his men to stand by the engines and be ready, and, as soon as he thought he knew the course the *Voorwaarts* would take, had given orders for the instant reversal of the engines, and they had been instantly reversed. He had therefore done what he could to prevent the collision, and the answer given to the court by the naval assessors was a full justification of his conduct. There were sufficient circumstances in this case to excuse the want of a literal observance of the regulations: *The Magnet* ⁽³⁾.

The *Solicitor-General*, in reply.

LORD BLACKBURN: My Lords, there had been cross appeals here, and the judgment of the Court of Appeal varied a judgment of the Admiralty Division.

The *Voorwaarts*, a large steamer belonging to the appellants, came into collision with the *Khediye*, a large steamer belonging to the respondents, in the channel that lies north

⁽¹⁾ 2 Asp. Mar. Law Cas., 454.

Rep., 4 A. & E., 422; on appeal, 2 Asp.

⁽²⁾ 2 Asp. Mar. Law Cas., 478; Law Mar. Law Cas., 565.

⁽³⁾ Law Rep., 4 A. & E., 417.

of the island of Penang. Both sustained heavy damage, and each asserted that the misfortune was wholly to be attributed to the misconduct of the other vessel, and that their own vessel was free from blame.

*The claim and counter-claim were tried before the [880 judge of the Admiralty and two nautical assessors. The judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth. But he did not think it necessary to say which story was true. For, taking the evidence given on behalf of the Voorwaarts to be honest, he and his assessors came to the conclusion that the conduct of the second officer, who was in charge, seeing a steamer approaching in an opposite direction, relinquishing such charge to the third officer, at the very time when his vessel was actually manœuvring, and going below to his dinner, was very reprehensible; and that the Voorwaarts was to blame for want of a proper look-out (which, looking at the evidence, I understand to mean a proper look-out during the time the third officer was in charge), and for not stopping her speed after the change from red light to green (which of course means, even on the supposition that there was such a change on the part of the Khedive, and that the evidence on the other side, which denied that there was any such change, was not trustworthy). He then adds ('): "With respect to the counter-claim of the Khedive, we are of opinion that it is unnecessary to consider whether the statements of her witnesses with respect to the bearing of the lights, especially of the green light of the Voorwaarts, be or be not accurate, for we think that the provisions of Article 16 of the Regulations for Preventing Collisions at Sea apply to the Khedive as well as to the Voorwaarts, and that the Khedive ought, in the circumstances, to have stopped and reversed, or at least slackened her speed, at a distance and at a time which would have prevented the collision. The policy and principle of the rule in question is clearly to inculcate the necessity of immediately taking the speed off the vessel when in such proximity to another vessel as to render a collision probable. I therefore pronounce both vessels to blame."

Both parties appealed to the Court of Appeal, which also was *assisted by nautical assessors. The judges of [881

(') The case in the court below appeared to be one wholly depending on the evidence of facts, and therefore was not reported. The quotations here introduced are taken entirely from the printed papers of the parties.

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Appeal did inquire into the question which the court below had thought it unnecessary to consider. They came to the conclusion that the facts were more accurately described by the witnesses for the Khedive than by the witnesses for the Voorwaarts, and that the vessels were at least three and a half miles apart, were approaching each other green light to green light, with so large a bearing as to make it certain that if both kept their course they would have passed without any danger of a collision. Lord Justice Brett, in delivering the judgment of the Court of Appeal, says: "We are of opinion that those vessels continued to approach each other in that way till they were within the vicinity of each other, not farther at the most than a mile from each other. Probably they were somewhat less than a mile, and being in that position, green light to green light, starboard bow to starboard bow, on opposite and parallel courses, at so short a distance as that, the Voorwaarts suddenly put her helm hard-a-port, and so came suddenly towards the other ship, which up to that moment had been in a state of safety. Up to that moment there was no occasion whatever for the other ship to have slowed its speed or altered its manœuvres in any way. The Khedive was perfectly justified up to that moment in continuing at full speed, because the vessels were so approaching that there was no danger of collision if they had kept on, but the master of the Voorwaarts, from want of look-out, probably, and then from fear of suddenly finding himself in the vicinity of another ship, performs the wrong manœuvre, the absolutely wrong manœuvre—he puts his helm hard-a-port. It was noticed by those gentlemen who advised us that this was not merely caused by his want of look-out, but by his want of presence of mind; but there was also a want of due care in navigation in this case, that a superior officer to him having been on the deck at the time the steamers were approaching each other, left it, whereas in their judgment, in which we entirely agree, a senior officer, when ships are approaching in that way, ought not, being on the deck, to have left it. However that may be, there was an absolutely wrong manœuvre by the Voorwaarts, bringing the ships from a state of safety into one of sudden and imminent danger. The captain of the Khedive, on seeing this 882] manœuvre, gave orders to put his own *helm hard-a-starboard, and at the same moment he gave the order to stand by the engines. He did not at that moment give the order to stop the engines, or to reverse them at full speed. The helm was put hard-a-starboard, the engineer did stand

by the engines; it was not for the space of a minute, or perhaps somewhat more than a minute, that the captain of the Khedive ordered the engines to be stopped and reversed at full speed. Directly that order was given they were stopped and reversed at full speed and they were reversing at full speed at the moment of the collision. The engines of the Voorwaarts had not been stopped even, but were going full speed ahead until the two ships were in collision. That the Voorwaarts, therefore, was to blame, and greatly to blame, cannot be doubted. The question must remain whether those on board the Khedive were guilty, within the rule that I have endeavored to enunciate, from a want of ordinary care and skill in what they did. We are advised, and we are of opinion, that up to the time when the Voorwaarts put her helm hard-a-port and brought the ships into sudden danger, there was nothing wrong on the part of those who were in command of the Khedive, or of those on board of her. We are advised, and are of opinion, that under the circumstances and in the position of those two ships, it was quite right that the helm of the Khedive should be put hard-a-starboard. But then comes the question whether the captain ought not, at the time he gave the order to put the helm hard-a-starboard, to have ordered the engines to be stopped and reversed. It was obvious that at that moment there were two steamships approaching each other in great danger of collision; it is obvious, therefore, that the rule of navigation applied, unless there were something which made it necessary for the safety of the navigation that the rule as to stopping and reversing should not be acted upon. Upon that, of course, we are bound to consult the gentlemen who advise us, and the question which we put to them was, 'Was it a right manœuvre, under the circumstances, on the part of the captain of the Khedive to order the engineers to stand by the engines, or was the right manœuvre then to order the engines at once to be stopped and reversed?' The answer was, as might have been expected, that the right manœuvre would have been to order the engines at once to be stopped and reversed."

*My Lords, at your bar there was a lengthened [883 argument on the evidence; the counsel for the appellants urging every argument that could be produced to lead your Lordships to draw the conclusion that the Voorwaarts was not to blame, to the extent at least to which the Court of Appeal thought she was, or at least that the Khedive was not free from blame up to the time when the Voorwaarts put her helm hard-a-port. I should not, even if my own

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judgment would have been the other way, like to differ on a question of fact from those who had the assistance of nautical assessors; but as far as I am able to form an opinion, I agree with the Court of Appeal. I will indicate the principal reason why I do so. There is a conflict of testimony on this point. The second officer says, that exactly at 7.30, that is, about fifteen minutes before the collision, he saw a blue light from the Khedive, and almost at the same instant, and just before the third officer relieved him, he had passed the order to port, having just then, as he says, seen the red light about half a point on his starboard bow, and, as he judged, four or five miles off. But it was not on that account that he gave the order to port, but because his vessel had fallen a couple of degrees to the west of the course he was steering W. $\frac{1}{2}$ N., and he ordered the helm a little bit to port to bring her back to her course. The third officer who was coming up to relieve him thought the order to port was not heard, and repeated it loudly. This brought out the captain, who also says he saw the red light, but on his port bow, and the chief officer, who was there, but not on duty, also says that he saw the red light on the port bow. It is to be observed that neither captain nor the chief officer stayed long enough to have more than a glimpse of this red light, but still there were four witnesses who say that they then saw the red light, and if they are believed, the head of the Khedive must at this time have been more towards the Voorwaarts than the captain of the Khedive had desired, for when he ran down towards the white light, which he then thought might be the stationary light of a pilot boat, he gave orders that it should be kept half a point in the starboard bow, and he thought this order was obeyed; but I do not myself think it improbable that the vessel did for a short time head a point farther south than was intended. But even if the third officer was right in thinking that at this 884] time the *Khedive, then at a considerable distance, showed her red light, that would in no way exonerate him from the obligation to keep a good look-out on the Khedive's lights whilst they were approaching nearer, and it was on the manoeuvres of the two ships, during the ten minutes or so that elapsed between the time when the third officer was left alone in charge and the time when he gave the order to put her helm hard to port, that all depended. The case of the Khedive, which the Court of Appeal believed, was that when the blue light was burnt out the vessels were six or seven miles apart, which is farther apart than the officers of the Voorwaarts say, and that the head

of the Khedive was immediately put on her old course E. $\frac{1}{2}$ N., whilst they watched the lights of the Voorwaarts and first saw for an instant the red light of the Voorwaarts and directly after her green light, the vessels being then about six miles apart and the time about 7.28. Then the helm was put to starboard, and the vessel's head brought to E.N.E., the green light of the Voorwaarts being seen two and a half to three points on the starboard bow; and then the vessels for ten or twelve minutes continued to run nearly parallel, green light to green light, till the Voorwaarts suddenly showed her red light, being then half a mile to three quarters of a mile off. If this is accurate, the conclusion is irresistible that the third officer of the Voorwaarts had kept no look-out at all during these ten minutes, having taken it for granted that the Khedive was continuing with her red light towards him, until he suddenly saw the green light and then lost his presence of mind and did the very worst thing he could do. The third officer says he did keep a look-out, and that the Khedive's red light continued visible till a blue light was burned on board the Khedive; that whilst it was burning the lights of the Khedive were obscured, and when the light went out he saw the green light and immediately put his helm hard to port. The Khedive did, it is admitted, after its first blue light proved a failure, burn a second blue light, but this was done whilst they were yet uncertain whether the white light of the Voorwaarts was the moving light of a steamer or the stationary light of a pilot boat, and therefore whilst the vessels were several miles apart. If the third officer speaks true the second blue light was burned when the vessels were within a mile of each other. This I think incredible. I do not know if all the *noble and learned Lords who [885 heard the argument agree with me in attaching so much weight to the time when the blue light was shown, but I believe they all agree that this House must act on the opinion of the Court of Appeal, that the Khedive was not to blame until after the collision was imminent, or perhaps I should say inevitable.

But there arises a question of great general importance, on which the judges of Appeal have reversed the judgment of the Court of Admiralty. In what follows I assume the story of the witnesses of the Khedive to be the truth, and that everything done by the Khedive was right until the Voorwaarts suddenly ported, being then within three quarters of a mile. Captain Steward gives this evidence in chief. He saw the red light. "*Mr. Butt*: How did

she bear on your starboard bow at that time?—A. About three points. Q. Did you give any order?—A. Yes. Q. What was it?—A. Hard-a-starboard. Q. What would have happened supposing you had hard-ported instead?—A. We should have come nearly stem on. Q. In other words, was it in your judgment safe then to port?—A. My professional judgment was that it was not safe to port. Q. And you gave the order hard-a-starbord?—A. Hard-a-starboard. Q. Did she keep her red in view, or did you ever see the green again before the collision?—A. No; kept the red in view. Q. Besides ordering hard-a-starboard, did you give any other order?—A. Stand by below, stand by the engines. Q. When was that given?—A. At the same time that hard-a-starboard was given. Q. What was your next order?—A. About a minute later I gave the order to full speed astern. Q. Did you judge at the time you gave the order full speed astern that the collision could be avoided or not?—A. I considered it inevitable then. Q. When you ordered your helm hard-a-starboard, with what view did you give the order?—A. With the view of endeavoring to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision. Q. I presume you knew when she changed from green to red what helm she was under?—A. Yes. Q. What was it?—A. Evidently hard-a-port. Q. You have said that you gave the order afterwards to reverse your engines, or put them full speed astern; was that order obeyed?—A. It was, the telegraph answered immediately."

886] *And afterwards on cross-examination: Q. "You say that you ordered 'hard-a-starboard,' and you at the same time ordered the engineers to stand by?—A. Yes; to stand by. Q. Is that so, at the same time?—A. At the same time. Q. You had seen then that the Voorwaarts was porting?—A. Yes. Q. And, according to your account, porting suddenly?—A. Porting suddenly. Q. Was that the only order which you then gave to the engines, to stand by?—A. That was the first order that I gave to the engines. Q. Was that the only order you then gave?—A. At that moment, yes. Q. Then your engines continued until a minute later 'full speed ahead'?—A. Yes, two minutes later. Q. Then two minutes after you saw she was porting you continued your engines full speed ahead? A. Yes. Q. What for?—A. In the hopes of going off in parallel courses; my head was going off sharp, and I was in hopes by continuing on my course that we should come parallel, or at any rate lessen the force of the collision; the farther

I could get off and the longer I could keep on, the more likely it was that we should pass clear. *Re-examined by Mr. Butt:* Q. One word upon that last question. You say you kept your engines going ahead for a little time after the order to stand by. She was swinging round under her starboard helm?—A. Starboard helm. Q. Will she continue to swing round faster under that starboard helm if you stop her, or if you keep the engines going ahead?—A. Keeping the engines going ahead she would swing faster; the greater the speed the faster she obeys the helm. Q. Whatever the other ship did, you did stop and reverse before the collision?—A. Yes, a minute. Q. And you were going astern at the time of the collision?—A. Yes.”

This evidence I accept as quite accurate. The phrase “a minute” in the examination-in-chief and “two minutes” in the cross-examination are no discrepancy. The captain had other things to think of than the precise length of time. Allan, who was in the engine-room, and who would have to enter the times in his log, says he looked at the clock in the engine-room, and that by it the order to turn astern full speed was given a minute and a half after the order to stand by the engines, and that the collision was three minutes after the order to stand by the engines.

As I stated before, the judges of Appeal had the advantage of *having nautical assessors whose advice they [887 could ask on anything the court thought important. This House has not that advantage, and must act on the answers given to the questions actually asked. The nautical assessors, as appears by what I quoted before, advised the Court of Appeal that the order to put the helm hard to starboard was right; but that the order full speed astern ought to have been given at once; by which I understand them to mean, not merely that to go on full speed was in contravention of the 16th Article of the Regulations for preventing collisions at sea, but that it was bad seamanship in itself; and this was in conformity with the opinion of the Court of Admiralty. But the judges of Appeal thought this did not dispose of the case; and they asked and obtained the advice of their assessors on a farther question. To avoid any mistake as to what was asked and what was answered, I will read the words of the judgment on this part of the case. After saying that the assessors said that the right manœuvre was not to order the engineer merely to stand by the engines, but the right manœuvre would have been to order the engines at once to be stopped and reversed, Lord Justice Brett proceeds, “Therefore at that moment the captain of

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the Khedive did not do what was absolutely the right thing. Moreover, if he did break the rule of navigation by breaking that rule at that moment, there is no doubt that he put the property and the liability of his owners into the greatest jeopardy. We do not desire in the least to encourage the idea that the captain of a steamer when there is danger of a collision with another, should break from this rule to stop and reverse; it is a most valuable rule, and must be obeyed if it possibly can be; and those who disobey it must be made liable for that disobedience unless they can, under very peculiar circumstances, excuse themselves. But, having regard to what I have before stated, we then asked our advisers the following question:—If this order which he gave was not absolutely right under the circumstances (that is, the order only that the engineers should stand by the engines), was that such an order as a captain of ordinary care, skill, and nerve, might be fairly as a seaman excused for giving under the circumstances in which this captain was placed. Those circumstances, as was well known to those who advised 888] us, were that at a *distance of not more than a mile the ships were starboard bow to starboard bow, approaching on opposite courses, so as not to involve risk of collision, and at that distance those on board the Voorwaarts suddenly put their helm hard-a-port so as to bring them suddenly towards the Khedive, and so put the Khedive into a position of sudden, unexpected, critical danger. Therefore the question comes to be whether the captain of the Khedive being so suddenly placed in such a critical position it can be said that he was guilty of a want of ordinary care and skill under such circumstances in hesitating for the space of a minute whether he would order his engines to be reversed full speed. And I cannot help stating that that hesitation might involve this view, the ships being in such a position, if those on board the Voorwaarts had, from doing the wrong thing, resolved in a moment to do the right thing, then it might be that the going ahead full speed of the Khedive would give them more room to get right again from what they were doing; but still we are advised, and are of opinion, that he did the wrong thing under the circumstances. But in answer to that last question those advisers have advised us that the captain of the Khedive might be, as a seaman, fairly excused for that hesitation of a minute, and if so we are of opinion that, although he broke the rule, and although he did not do that which was the best thing to do, yet in respect of that hesitation of a moment (I will not say for a moment—for a minute) to do the best thing he is not to be found guilty

of a want of ordinary care, and skill, and nerve under those difficult circumstances in which he was placed. If that be so, those who conduct the case of the Khedive have proved that those on board the Voorwaarts were guilty of negligence in the legal sense, and have satisfied the court that those in charge of the Khedive were not guilty of negligence or want of ordinary care, skill, and nerve which contributed to the accident. I may say that those who advised us are of opinion that the vessels, when this manœuvre of the Voorwaarts was made, were so close that considering the size of the vessels, considering the speed at which they were both then, justifiably, going, considering that they were screwships of the largest calibre, and that they were then so close, the circumstances of stopping and reversing, in the opinion of our advisers, would not have had a material [889 effect on either ship." I may observe that this does not appear to have been the opinion of the judge of the Admiralty and his assessors, for they say that it might have prevented the collision. Lord Justice Brett proceeds: "If so the collision was inevitable when the Voorwaarts performed her wrong manœuvre, and if so, even if the captain of the Khedive was wrong, he would not be wrong in any manner contributing to the accident. But without differing from those gentlemen, we do not think it right to put this decision quite alone upon that view of theirs—rather upon the other; it being manifest that that view of theirs goes a long way to justify the other view, namely, that if this was done at a time when the vessels were so close, in their opinion a collision was inevitable. If it were not quite inevitable it is obvious that it was done at a time that brought the captain of the Khedive suddenly and without warning into a most critical position of danger. It is upon that ruling only that we desire to base this judgment; and on that rule, and on our decision with regard to that rule, we are of opinion that the owners of the Voorwaarts are solely liable for this collision, and that damages must be awarded accordingly." Lord Justice James added, "The Lord Justice has communicated to us what the judgment would be, we were well aware of it, and I need not say that that is the judgment of the court. I may perhaps be allowed to add that if a heavy van drives along the street and makes the horse of a carriage unmanageable, I cannot hold that the coachman is to blame if he pulls the wrong rein."

I may observe that the terms in which the question is asked seem to me hardly to do Captain Steward justice. He at once, on seeing the red light, took in the situation.

He thought, and was right in thinking, that the Voorwaarts was crossing his bows, and that within five minutes from that time, if he did nothing, he must come stem on upon her and probably send her to the bottom. He did not hesitate, but at once made up his mind that the best thing to do was to put his helm hard to starboard with a view to endeavor to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision, and in this the nautical assessors say he was right; and as far as I am competent to form an opinion, I should say that if he had not 890] done so *the Voorwaarts would probably have been sunk, and so that by so doing he probably prevented a great loss of life, and diminished the loss of property. He did not reverse his engines, which was an error; but as I think I must understand the answer of the assessors, was such an error as a seaman might, under such circumstances, commit without proving thereby that he was deficient in care, skill, or nerve; and this the judges of Appeal thought justified them in reversing the judgment of the Court of Admiralty, and finding the Khedive free from blame. I am sorry to be obliged to say that I come to a different conclusion; I feel how hard it is when, on the view I take of the facts, Captain Steward showed so much skill and nerve and did so much good, to say that his owners should be made liable to a heavy payment in consequence of a venial error on his part, but the view I take of the Merchant Shipping Act, 1873, 36 & 37 Vict. c. 85, s. 17, is such as to compel me to advise your Lordships that this should be done.

My Lords, in the *River Wear Commissioners v. Adamson* ⁽¹⁾ I expressed my view of the common law in these terms ⁽²⁾: "That the owner of the injured property must bear his own loss unless he can establish that some other person is in fault and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner. But he does establish such a liability against any persons, who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land and a ship on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage, and if he can prove that the person who has been guilty of either stood in the relation of servant to another, and that the fault occurred in the course of his employment, he establishes a

⁽¹⁾ 2 App. Cas., 748; 21 Eng. R., 1.

⁽²⁾ 2 App. Cas., at p. 767.

liability against the master also." I should add, to prevent possible misapprehension, that although apart from statute law, the duty which the court casts upon him who has the management and control of a ship at sea is the same as that which the law casts on those who have the management of a carriage on shore, viz., to take reasonable care and to use reasonable *skill to prevent it from doing injury, yet [89] that the different nature of the two things makes a great difference in the practical application of the rule. Much greater care is reasonably required from the crew of a ship who ought to keep a look-out for miles, than from the driver of a carriage who does enough if he looks ahead for yards; much more skill is reasonably required from the person who takes the command of a steamer than from one who drives a carriage.

The earlier part of Lord Justice Brett's judgment expresses the rule of common law to the same effect, though in other language, and I need not add that so far I quite agree with him. And I agree also in what he says that a man may not do the right thing, nay may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or of reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence.

It was on the application of this last principle that the Court of Appeal reversed the judgment of the Court of Admiralty in the *Bywell Castle* (¹). In that case no question arose as to the infringement of any of the statutable directions, and the question was entirely one of degree, how much allowance should be made for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill.

But the Legislature has thought fit from time to time to make enactments as to what vessels shall do; it is obviously desirable that one ship when seeing another should know what it is to be expected that she will do. These directions

(¹) 4 P. D., 219; 32 Eng. R., 250.

are to be followed ; and to secure that they will be observed the Legislature made provisions which have been varied [892] from time to time. That in *the Merchant Shipping Act, 1854, sect. 298, was in these terms: "If in any case of collision it appears to the court before which the case is tried that such collision *was occasioned by the non-observance of any rule,*" &c., "the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary."

On the construction of this and similarly worded enactments it had been held in *Tuff v. Warman* (*) that though the plaintiff had infringed the rules, and by his neglect of duty brought the vessel into danger, yet if the defendant could by reasonable care have avoided the consequences of the plaintiff's neglect, but did not, and so caused the injury, the plaintiff could recover, as under such circumstances the collision was not occasioned by the non-observance of the rule. This prevented the statute from producing the effect which those who framed it wished ; but nothing was done till attention being apparently called to the subject by the case of *The Fenham* (†), in the Merchant Shipping Act, 1873, s. 17 was passed in the following words: "If in any case of collision it is proved to the court before which this case is tried, that any of the regulations for preventing collisions contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." The regulations which come into question in this case are, "*Ships under steam to slacken speed* : Art. 16. Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or if necessary, stop and reverse ; and every steamship shall, when in a fog, go at a moderate speed. *Proviso to save special cases* : Art. 19. In obeying and construing these rules due regard must be had to all dangers of navigation ; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from [893] the above rules necessary in order to *avoid immediate danger. *No ship under any circumstances to neglect*

(*) 2 C. B. (N.S.) 740; 26 L. J. (C.P.) 263; affirmed 3 C. B. (N.S.) 573; 27 L. J. (C.P.) 322.

(†) Law Rep., 5 P. C., 212.

proper precautions: Art. 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The change made in the language of the enactment cannot have been made without an object, and one object I think must have been to take away what was the *ratio decidendi* in *Tuff v. Warman* ⁽¹⁾; and another to render it unnecessary to have resort to an artificial rule as to the inference to be drawn from evidence as in *The Fenham* ⁽²⁾.

Since that statute was passed there have been two important decisions of the Privy Council upon its construction, *The Hibernia* ⁽³⁾ and *The Fanny M. Carvill* ⁽⁴⁾. For some unexplained reason they are not reported in the 'Law Reports.' There has not been, as far as I can learn, any case in the Court of Appeal requiring it to consider the case of the statute till the present, and, most unfortunately, the reasons which induced the court, in the present case to pass it over as irrelevant, are not given. It is never satisfactory to come to the conclusion that the opinion of another is wrong without appreciating the reasons which led to that opinion: here your Lordships are forced to do so, for the Court of Appeal has not given those reasons.

In *The Fanny M. Carvill* ⁽⁵⁾, it is said in the Privy Council, "In construing the clause in question it is to be observed that the act of 1873 did not repeal, nor was it a substitute for the Merchant Shipping Acts of 1854 and 1862. On the contrary, its 2d section declares that it is to be construed as one with them. Now, the 298th section of the act of 1854, and the 29th section of the act of 1862 provide, each, that in certain cases of the infringement of the sailing regulations those guilty of the infringement shall incur certain consequences. But each contains the *qualification that [894] the collision shall appear to the court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in the 17th section of the act of 1873 the Legislature omitted this qualification, it must be presumed to have done so designedly, and at all events to have intended that it should no longer be incumbent on the oppo-

⁽¹⁾ 2 C. B. (N.S.), 740; 26 L. J. (C.P.), 263; affirmed 5 C. B. (N.S.), 573; 27 L. J. (C.P.), 322.

⁽²⁾ Law Rep., 3 P. C., 212.

⁽³⁾ 2 Asp. Mar. Law Cas., 454.

⁽⁴⁾ Ibid, 478; Law Rep., 4 A. & E., 422; on appeal, 2 Asp. Mar. Law Cas., 565.

site party to prove that the non-observance of the regulations in part contributed to the collision. Nor does it appear to their Lordships that the 17th section of the act of 1873 can be taken merely to shift the burden of proof by raising a presumption of culpability to be rebutted by proof that the non-observance of the regulations did not in fact contribute to the collision, because the preceding, the 18th section, clearly shows that where the Legislature intended only to raise a presumption capable of being rebutted by such proof, it used apt words to express that intention. Their Lordships therefore conceive that whatever be the true construction of the enactment in question that which would take the case out of its operation by mere proof that the infringement of the regulation did not in fact contribute to the collision, is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact (often a very nice one) upon conflicting evidence."

The rest of the judgment proceeds on a question not raised by the facts in the present case. But I quite agree in this view of the law, and it renders it unnecessary to consider the last finding of the nautical assessors on which the Court of Appeal did not act, or to inquire whether they or the judge of the Admiralty took the right view of the fact.

I think farther, that where a sudden change of circumstances takes place which brings a regulation into operation though the thing prescribed by the regulations is not done by the person in charge, yet the regulation can hardly be said to be infringed by him till he knows or ought to have known, and but for his negligence would have known, of the change of circumstances. But it would be doing Captain Steward great injustice to say that such was his condition. He at once took in the situation and was aware that there was risk of a collision, and that it was imminent if not inevitable, and he acted with great promptitude and 895] skill, so as *greatly to alleviate the violence of that inevitable collision. But he did not stop and reverse, nor even slacken his speed; and there he departed from the course prescribed by Regulation 16; nor was there anything in the circumstances rendering a departure from this rule necessary in order to avoid immediate danger. Even if it would (in the absence of such a positive rule) be better seamanship to keep way on the ship in order to make her more manageable (which is not clear), the Legislature has thought it better to prescribe the course which must be followed.

I feel (though for the reasons stated before, very sorry for

it) obliged to advise your Lordships to allow this appeal and restore the order of the Admiralty.

LORD WATSON: My Lords, in this case it is not disputed that about 7.40 P. M., on the 23d of May, 1878, two steam-vessels of large burthen, the *Voorwaarts* and the *Khedive*, came into collision in the open sea, some miles to the northward of Penang Island; and the question to be determined is whether either or both of these vessels must be held responsible for the consequences of the collision.

The accounts given by the witnesses from the two vessels are quite irreconcilable, although they have certain features in common. These are, that the masthead lights of each vessel became visible to the other about twenty minutes, and their side lights at least ten minutes before actual collision, and that, from the time their side lights opened, they continued to approach each other on perfectly safe courses until three or four minutes before the collision, when one of them executed a wrong manœuvre which brought her across the bows of the other; but the witnesses of the *Voorwaarts* state that the vessels were approaching red to red, and that the *Khedive* wrongfully starboarded her helm and showed her green light on the port bow of the *Voorwaarts*—whereas the witnesses of the *Khedive* allege that they were approaching green to green when the *Voorwaarts* wrongfully ported her helm, and showed her red light on the starboard bow of the *Khedive*. Again, the witnesses on both sides are agreed that after the vessels had sighted each other the *Khedive* sent up two blue signal lights in succession; but according to the *Khedive* *witnesses, the second of these blue [896] lights had burned out at or before 7.30, whilst according to those of the *Voorwaarts*, the first blue light was not ignited until 7.30, and the second disappeared shortly before the collision, just as the *Khedive* showed her green light upon the port bow of the *Voorwaarts*.

It appears to be a matter of reasonable certainty, that of these contradictory versions of what took place before the collision, one or other must be substantially true, and in these circumstances I have no hesitation in giving credence to the story told by the witnesses of the *Khedive*, because it is in my opinion the more consistent and the more probable of the two. I do not think it necessary to criticise the evidence in detail, but I shall indicate the main considerations which have led me to form that conclusion.

On board the *Khedive*, three of the ship's officers were on the bridge; the captain and first officer taking charge of the navigation, the fifth officer being stationed on the port side

for the purpose of telegraphing the captain's orders to the engineer below, and they all remained at their posts from the time when the bright light of the Voorwaarts was first seen until the collision. On board the Voorwaarts during that period, a very different state of matters prevailed. When the bright light of the Khedive first became visible the captain and second officer were on the bridge, but shortly afterwards the captain went down to his dinner in the chart room leaving the second officer alone in charge. Immediately after seven bells had struck (7.30 P. M.) three of the ship's officers joined the second officer upon the bridge. The third officer, who had dined, came up to relieve the second officer of his watch, in order that he might dine. The captain and the first officer were attracted by an order to "bakbord" or port, which it seems had been given by the second, but was repeated in a loud tone by the third officer. The assemblage dispersed almost as soon as it met. The second officer, although his watch continued until eight P. M., went off to his dinner, the captain returned to his chart room, whilst the first officer went to change his clothes for the night, leaving the navigation of the Voorwaarts from that time until the collision took place in the sole charge of the third officer. The gentlemen of skill in the Admiralty 897] Court *appear to have been of opinion that the conduct of the second officer in relinquishing his charge to one of inferior rank, at a time when his vessel was actually manœuvring in order to keep clear of an approaching steamer, was very reprehensible, and of itself constituted fault on the part of the Voorwaarts. Whilst I do not venture to differ from that conclusion, I do not find it necessary to rest my judgment upon it, because, apart from all questions involving nautical skill, I take it to be clear that a consistent narrative by three officers who were present and observing throughout the whole course of events is, *ceteris paribus*, more reliable than an account given by four officers, one of whom was the sole observer during the first half of the period, and another the sole observer during the critical ten minutes preceding the collision, the other two having no opportunity for observation between 7.20 and 7.40 P. M., except on one brief occasion about the middle of the period.

I also think that the account given by the Khedive witnesses of the time at which her blue lights were burned is favored by all the probabilities of the case. The only possible object of her captain in making these signals was to attract the notice of a pilot vessel, or of what he believed

to be a pilot vessel. It is certain that there was no pilot vessel in sight, and that what he must have believed to be a pilot vessel was none other than the Voorwaarts. Whilst it was perfectly natural that he should mistake the bright light of the Voorwaarts, when first seen at a distance of seven or eight miles, for the masthead light of a pilot vessel four or five miles away, it is in the last degree improbable that he should have fallen into that error exactly at half-past seven, the time of sending up the first blue light, as stated by the second officer of the Voorwaarts, fully ten minutes after the vessels came into sight of each other: several minutes after their side lights became visible according to the second officer, and when they were only about three or four miles apart according to the third officer of the Voorwaarts. And if it be once conceded that the Khedive's account of these blue lights is the correct one, the story told by the third officer of the Voorwaarts of what occurred during the ten minutes preceding the collision, becomes absolutely incredible.

*But, assuming it to be proved, as I think it is, [898 that the Voorwaarts was guilty of fault in unjustifiably steering across the bows of the Khedive, the appellants contend that the Khedive must also be held to have been in fault, and that the decree of the judge of the Admiralty Division ought therefore to be restored. They do not assert that the officers navigating the Khedive were guilty of negligence or fault in the sense of the common law; but they do assert that the Khedive infringed the 16th Article of the Regulations for Preventing Collisions at Sea, by failing to slacken speed, or stop and reverse, at a time when the vessels were in imminent danger of collision. And they maintain that, under the provisions of sect. 17 of 36 & 37 Vict. c. 85, the legal consequence of such infringement is that, for the purposes of the present case, the Khedive must be deemed to have been in fault.

The facts of the case bearing upon this question are shortly these, that the Voorwaarts having, a few minutes before the collision, suddenly opened her red light upon the starboard bow of the Khedive, the captain of the Khedive, at 7.37 P.M., starboarded his helm with the view, as he states, "of endeavoring to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision," and at the same time signalled to his engineer to "stand by;" that at 7.38½ P.M. the captain, considering that collision was then inevitable, gave the order to stop and reverse, which was promptly obeyed, and that the en-

gines of the Khedive had been going full speed astern for nearly a minute when the vessels collided at 7.40 P.M.

What effect the Khedive's maintaining her full speed for the minute and a half intervening between the orders to "stand by" and to stop and reverse, had in the collision, it is not easy and perhaps not necessary to ascertain with any degree of precision. The gentlemen of skill who assisted the judge of the Admiralty Court seem to have advised that the Khedive "ought, in the circumstances, to have stopped and reversed, or at least slackened her speed, at a distance and at a time which would have prevented the collision." Seeing that the Khedive could not be under any possible duty to slacken speed so long as the vessels were approaching each other green to green, that finding appears to me to imply that, in the opinion of these experts, the collision might have *been avoided if the captain of the Khedive had stopped and reversed, or even slackened speed, at the time when he starboarded and gave the order to stand by. The gentlemen who advised the Court of Appeal appear to have been of opinion that at the time when the Voorwaarts made her wrong manœuvre the vessels were "so close that the circumstance of stopping and reversing would not have had a material effect on either ship." The result of these views seems to be that it is not possible to determine, with any degree of certainty, what the effect of the unexecuted manœuvre would have been; but that it is certain that it would have been to some appreciable extent beneficial.

The experts in the Court of Appeal are of opinion that the absolutely right manœuvre on the part of the captain of the Khedive would have been to stop and reverse immediately after the red light of the Voorwaarts was seen. They are of opinion that the captain did, for the minute and a half after that light became visible, adopt not the better, but the less expedient manœuvre, although they do not think the adoption of the better would have materially affected the collision.

I must now advert to those statutory provisions in respect of which it is contended that the Khedive must be deemed to have been in fault. The enactments especially founded on by the appellants are to be found in Article 16 of the Regulations embodied in the act of 1862, and sect. 17 of the Merchant Shipping Acts Amendment Act of 1873. In construing these enactments, I think it may be useful to consider what has been the course of legislation for the avowed purpose of preventing collisions at sea.

The Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), enacted certain rules in regard to lights, fog signals, and the courses to be steered by vessels meeting and passing each other, and for enforcing the observance of these statutory rules it was provided (sect. 298) that where, in any case of collision, it appeared to the court that the collision was occasioned by the non-observance of any of them, the owner of the ship by which the rule was infringed should not be entitled to recover any recompense for the damage sustained by his ship, unless it were shown to the satisfaction of the court that the circumstances of the case *rendered a [900] departure from the rule necessary. The Legislature had not, as yet, made any regulation touching the speed of meeting vessels.

The Amendment Act of 1862 (25 & 26 Vict. c. 63), repealed by sect. 2, and relative Table A., the rules and also sect. 298 of the act of 1854, and by sect. 25 and relative schedule C., enacted a new code of regulations for preventing collisions at sea, power being given to Her Majesty to alter or add to them, from time to time, on the joint recommendation of the Admiralty and the Board of Trade. The 16th article of the regulations, which is still in force, provides that "every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate pace."

By sect. 29 of the act of 1862 it was enacted that "if in any case of collision it appears to the court before whom the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary."

The Amendment Act of 1873 (36 & 37 Vict. c. 85), made no change upon the regulation as to speed, but it repealed (sect. 33) sect. 29 of the act of 1862, and in lieu thereof enacted (sect. 17) as follows: "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary."

I think it is impossible, upon a careful consideration of

these successive enactments, to avoid the inference that the Legislature did not intend, in certain specified circumstances, to leave mariners to decide for themselves, but on the contrary, intended to prescribe rules to be observed by all in these circumstances; and that no one was to be excused for non-compliance, or exempted from the statutory 901] *consequences of non-compliance with the rules, in circumstances to which they were applicable, unless he could bring himself within a statutory exception. I am also of opinion that in enacting these regulations, and in fencing them with provisions as to the consequences of non-observance, the Legislature was not declaring or even relying upon any known principle of law, but was deliberately creating many new duties, with correlative responsibilities, unknown to the common law. It is farther apparent that the repeal of sect. 29 of the act of 1862, and the substitution for it of sect. 17 of the act of 1873, must have been intended to increase the stringency of the statutory regulations.

The interpretation of sect. 17 of the more recent act, so far as required for the decision of the present case, does not appear to me to be attended with difficulty. If a vessel at or about the time of collision with another, infringe a statutory rule which was in the circumstances applicable, and if it be not established that a necessity existed for departing from the rule, the vessel so infringing must, in terms of the statute, be held to have been in fault. Now on the assumption that the Khedive did infringe Article 16 of the Regulations, it has not been suggested, and it is certainly not proved, that the captain of the Khedive was constrained to depart from it by any necessity, real or supposed; and if that which I have assumed were conceded, I should have no hesitation in applying the provisions of sect. 17 to the case, and holding that the Khedive was in fault. It therefore becomes necessary to consider whether the 16th regulation was or was not infringed by the Khedive.

Apart from statutory qualifications or exemptions, to which I shall immediately refer, it does not seem doubtful that during the period of a minute and a half which elapsed between the order to "stand by" and the order to stop and reverse, the Khedive was within the rule established by the 16th article, and disobeyed it. At the time the order to "stand by" was given, the two vessels were not only approaching each other, "so as to involve risk of collision," but were seen and known to be so by the captain of the Khedive. Had it been possible to hold, upon the evidence, that the period in question was so brief, and the Voorwaarts'

sudden change of course so startling, that the captain could not be fairly *expected to suppose, and did not be- [902 lieve the fact that a collision was imminent before he gave the order to stop and reverse, I should in that case have acquitted the Khedive of fault, on the ground that the 16th article could not reasonably be held to apply before the moment at which it was actually obeyed. But the captain's own testimony excludes that inference, because he distinctly avows that he at once saw the risk of the collision, but, instead of giving obedience to the rule, he steered so as to diminish the violence of the concussion which he anticipated.

The 16th article is expressed in terms absolute and unqualified; but it is rightly contended for the Khedive that it must be read in connection with the 19th article, which runs as follows: "In obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." This article undoubtedly introduces certain important qualifications of the rule enacted by article 16; but I do not think the case of the Khedive can be brought within either of the exceptions which it creates. There is nothing in the case to suggest the existence of any danger of navigation, a due regard to which would have led to a disregard of the 16th rule. The only existing danger was the very danger to which the rule applies, and to prevent which it was enacted. And there is just as little room for the suggestion that there existed any special circumstances which rendered it necessary for the Khedive to continue at full speed, instead of slowing, or stopping, or reversing, in order to avoid immediate danger.

I am accordingly of opinion that the Khedive, being within the rule of article 16, and not within any of the statutory exceptions to that rule, infringed it; and, seeing it has not been proved to my satisfaction that the circumstances of the case made a departure from the rule necessary, I consider myself bound by the provisions of the act of 1873 (section 17) to hold that the Khedive was in fault.

It was not without hesitation that I ventured at first to differ from the opinions expressed by the learned judges of the Court of Appeal. But fuller consideration of the case has satisfied me that *the principle upon which [903 their Lordships decided in favor of the Khedive is inconsistent with the policy and provisions of the Merchant Shipping Acts. The principle, as I understand it, may be thus

formulated :—When two vessels, A. and B., are approaching near to each other under steam, each steering a proper course, and A. is suddenly, by a wrong manœuvre placed in a position of critical danger, and exposed to the obvious risk of collision, A. shall not be deemed to be in fault by reason of her captain not having given the order to slacken speed or to stop and reverse, as required by the 16th regulation, provided it is established to the satisfaction of the court that a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such order.

I have possibly failed to give adequate expression to the principle which is so elaborately expounded in the opinion of the Lord Justice Brett, who in this case delivered the judgment of the Court of Appeal; but I think I am justified in stating that his Lordship did not decide in favor of the *Khedive* because she was not within the 16th regulation, or because she was within any exception expressed in the statutes, but solely because he held it to be proved that departure from the rule, in the circumstances in which the captain of the *Khedive* was placed, did not imply such want of care and forethought as would constitute negligence or fault at common law on the part of a seaman of average skill and nerve. I cannot accept the principle thus affirmed by the Court of Appeal, because it practically substitutes for the statutory definition of fault the old rule of the common law, which, in my opinion, the statutory enactments were intended to supersede. The result of adopting the principle must be that whenever the risk of collision has been occasioned by the faulty manœuvre of one of two approaching vessels, the other vessel will be exempted from the statutory test of liability. Antecedent fault on the part of one of the colliding vessels must characterize a very considerable proportion of the cases of collision at sea; and I think it may be assumed that sudden and imminent risk of collision is frequently due to that cause. To abrogate the statutory rule in such cases would be tantamount to defeating the leading purpose of its enactment. It was enacted with a view to obviate the risk and *minimize the results of collision; and the more imminent the risk the more imperative is the necessity for implicit obedience to the rule. The argument was very fairly pressed upon us, that the Legislature cannot have intended to push the rule to such harsh extremities, as to hold that a vessel was in fault, whose captain had done all that could be expected of a seaman of ordinary nerve and skill. With that argument I cannot

agree. It appears to me that it was the deliberate policy of the Legislature to compel sea captains, when their vessels are in danger of collision, to obey the rule and not to trust to their own nerve and skill; and that it was an essential part of the same policy to admit of no excuse for non-observance of the rule short of satisfactory evidence, either that the captain was constrained to disobey it by other perils of the sea, or that he adopted a course which, in the circumstances, was better than that prescribed by the rule. And, for my own part, I cannot think the Legislature has acted unwisely in applying a uniform statutory test to all such cases, instead of leaving them to be decided by the variable test of *fault*, as ascertained in each case with the aid of nautical opinion.

The present question does not appear to be directly ruled by any previous decision of the Court of Appeal; and I therefore regret that the Lords Justices did not criticise, or even refer to, the provisions of the Merchant Shipping Acts; because it may be that the grounds upon which their Lordships set aside these enactments, as inapplicable to the case of the *Khedive*, have not been brought fully under the notice of the House. In the cases of *The Hibernia* (*) and *The Fanny M. Carvill* (†) the point did arise for decision before the Judicial Committee of the Privy Council; and it is very satisfactory to find that in both these cases, the view taken by the learned Lords of the policy and effect of the safety clauses of the Merchant Shipping Acts, was in complete accordance with the judgment proposed to be pronounced by your Lordships, in which I concur.

LORD HATHERLEY: My Lords, in this case I have requested both my noble and learned friends to read to your Lordships their written opinions, *which are so [905 clearly expressed that they may be well understood by those who hereafter may have to take into their consideration the question of their duty when exposed to a possibility or danger of collision at sea.

My Lords, the case before us embraces two heads for consideration. The first is whether there has been any negligence, either by breach of rules or otherwise, on the part of the *Khedive*, the vessel sued by the owners of the *Voorwaarts*. The second question is whether the *Voorwaarts* itself was not guilty of violating the regulations of the Merchant Shipping Act, or whether at all events it did not contribute to the mischief. Now, my Lords, both the

(*) 2 Asp. Mar. Law Cas., 454.

Rep., 4 A. & E., 422; on appeal, 2 Asp.

(†) 2 Asp. Mar. Law Cas., 478; Law Mar. Law Cas., 565.

learned judge of the Admiralty Court, assisted by nautical assessors, and the learned judges of the Court of Appeal, also assisted by nautical assessors, were clearly of opinion that as regarded the Voorwaarts it was in fault in many particulars. I see no reason why their decisions should not be affirmed by your Lordships. I will not repeat what has been already stated in the opinions of my noble and learned friends, I only wish to express my entire concurrence in them.

As regards the Voorwaarts no other conclusion has been or could be arrived at than that there was considerable fault on the part of the officers of that vessel—[His Lordship referred to the evidence]—as to their leaving the deck, and the sudden porting the helm, and so changing the course as to bring that vessel into a position in which there was a probability of an immediate and direct collision with the Khedive. The Voorwaarts did not slacken speed, still less reverse the engines after the collision was seen to be imminent, until the very moment of its taking place. Therefore, my Lords, as to the Voorwaarts there can be no doubt or difficulty in the matter.

The question came to be what was to be said with reference to the position of the Khedive. I think the action was against the Khedive *in rem*, and the owners of that vessel put in a counter-claim with respect to the mischief done by the Voorwaarts. The courts have decided that the Voorwaarts is responsible, whether solely or not, for what took place. Now with regard to the Khedive all seems to have proceeded perfectly smoothly, so far as I can observe from 906] the evidence, until there was this sudden *change of direction on the part of the Voorwaarts by putting the helm hard-a-port, which brought the Voorwaarts and the Khedive nearer to each other at once, and ultimately brought about the collision. Upon that part of the case I confess I wished very carefully to read through the whole of the evidence. There is a great discrepancy between the testimony on the one side and on the other, greater than can possibly be reconciled, and that appears to be of the greatest importance. That subject has already been fully discussed, and I agree with my noble and learned friends who have preceded me that great weight is due to the opinions of the nautical assessors.

My Lords, the question being put to the nautical assessors, there was no difference of opinion in the court below that the rules and regulations for preventing collisions between steam vessels at sea, especially article No. 16, had not been

observed. That is the rule by which, when there is imminent danger, as there was in this case, of immediate collision, each person in charge of a ship is put under the responsibility of slackening speed, or, if necessary, stopping and reversing the engines. When we come to inquire what was done by the Khedive upon the extraordinary act I have described being done on the part of the Voorwaarts, we find that the captain of the Khedive (as my noble and learned friend has said) with great promptness and readiness, first of all starboarded the helm, and then finding a collision likely to take place if he went stem on to the other vessel, he gave the order to stand by the engines. The main question which comes before us is reduced to this, whether he should have gone beyond that and said or done either more or less at that time.

This question, my Lords, connected with what ought to have been the conduct of the captain of the Khedive on the occasion, has been referred as a special question to the nautical assessors by the Court of Appeal, and what the Lords Justices say is this, that although the nautical assessors said that to a certain extent what was proper had been done, yet they went on to say that the captain, at the same time that he gave the order to stand by the engines, ought to have ordered the stopping and the immediate reversal of the engines, so as to secure the Khedive from coming into immediate collision with the Voorwaarts. What he did *seems to have been done for the purpose of bringing the two vessels on parallel courses, so that if there were a collision at all between the vessels, it might have been by simple friction alongside instead of a direct collision, and have caused less damage in consequence.

But then the question is, should he or should he not have acted according to article No. 16, which lays down the course to be taken, and have stopped and reversed the engines, instead of going on at full speed? Now, my Lords, upon this there is a passage in the judgment of Lord Justice Brett which struck me during the argument, and has continued to strike me, as of considerable weight. It is this, "We are advised, and are of opinion, that under the circumstances and in the position of those two ships, it was quite right that the helm of the Khedive should be put hard-a-starboard. But then comes the question whether the captain ought not, at the time he gave the order to put the helm hard-a-starboard, to have ordered the engines to be stopped and reversed. It was obvious that at that moment there were two steamships approaching each other in great

danger of collision ; it is obvious, therefore, that the rule of navigation applied, unless there were something which made it necessary for the safety of the navigation that the rule as to stopping and reversing should not be acted upon. Upon that, of course, we are bound to consult the gentlemen who advise us, and the question which we put to them was, ' Was it a right manœuvre, under the circumstances, on the part of the captain of the Khedive to order the engineers to stand by the engines, or was the right manœuvre then to order the engines at once to be stopped and reversed ? ' The answer was, as might have been expected, that the right manœuvre was not to order the engineer merely to stand by the engines, but the right manœuvre would have been to order the engines at once to be stopped and reversed. Therefore, at that moment the captain of the Khedive did not do what was absolutely the right thing. Moreover, if he did break the rule of navigation, by breaking that rule at that moment there is no doubt that he put the property and the liability of his owners into the greatest jeopardy." The question, as the learned Lord Justice said, was whether there was a necessity established for departing 908] from the rule, and upon the answer *given by the nautical assessors the conclusion is that no such necessity was shown. Has it ever been said by nautical assessors that what the rule prescribes was not the right thing to do ? There appears to me to have been no excuse for a departure from the 16th rule.

The learned judges of the Court of Appeal put it still more strongly in another part. Lord Justice Brett there says, " In such a position, if those on board the Voorwaarts had, from doing the wrong thing resolved in a moment to do the right thing, then it might be that the going ahead full speed of the Khedive would give them more room to get right again from what they were doing ; but still we are advised, and are of opinion, that he did the wrong thing. But in answer to that last question, those advisers have advised us that the captain of the Khedive might be, as a seaman, fairly excused for that hesitation of a minute, and if so we are of opinion that, although he broke the rule, and although he did not do that which was the best thing to do, yet in respect of that short hesitation to do the best thing, he is not to be found guilty of a want of ordinary care and skill and nerve under the difficult circumstances in which he was placed." It appears to me, from reading that passage, that the learned judge has somewhat extended the exceptions from the liability to be deemed in default. He adds to those

exceptions which are specified this other exception: unless the captain can prove to the satisfaction of the judges who have to determine the case that he acted as a resolute seaman with good nerve, and so on. Now I apprehend, my Lords, that really the concluding observations which were made by my noble and learned friend who last preceded me (Lord Watson), citing the case of *The Hibernia* (¹), and the case of *The Fanny M. Carvill* (²), dispose exactly of this view, which appears to have been taken by the learned Lord Justice. If you can show that you could not adhere to the rule without producing danger, that is one of the specified exceptions. If you can show that there was an absolute necessity for doing what you did or what you omitted to do, then again you are exempted. And it is thus left open to you to show that you did not contribute to the mischief.

*Perhaps it is not astonishing that some little degree of confusion should arise from the numerous dealings with these acts of Parliament and the various changes in their wording. But in a case of immediate danger, where a collision appears to be inevitable and all depends upon the course of action immediately pursued, nothing can be more important than that those who have charge of the navigation of a vessel should know that if they depart from the rule which is laid down with sufficient distinctness, they must prove not only to their own satisfaction, but also to the satisfaction of the court which has to decide the question, that what was done was necessary for the purpose of avoiding immediate danger. Now, one remark occurs here, which is this, that these rules must be looked at very much from this point of view; they are general rules to be adopted by all persons having charge of the navigation of vessels with the exceptions which have been pointed out. This rule is not laid down merely for the sake of the vessel commanded by the man who breaks it, but for the sake of the vessel commanded by the man approaching at a distance and who has no right or reason to suppose that he will break it. If the rule is observed, every person will know precisely what he is to do, and will say, I will carry out my directions entirely with that knowledge which I possess. On the other hand, if the court allows these rules lightly to be departed from, the result will be the very evil which the act was intended to prevent. As I have just said, these are general rules, laid down to govern

(¹) 2 Asp. Mar. Law Cas., 454.

Rep., 4 A. & E., 422; on appeal, 2 Asp.

(²) 2 Asp. Mar. Law Cas., 478; Law Mar. Law Cas., 565.

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any person who has charge of a vessel, both for the sake of the safety of his own vessel and for the sake of the safety of the vessels approaching him. A strong instance of the importance of observing them occurs in this very case. If the rule had been acted upon, from the steady course which the two vessels were holding, it would in all probability have led to a successful issue, but the disregard of the rule with reference to the porting of the helm caused the one vessel to steer on to the other, and that very danger was produced which the rule was intended to prevent.

Therefore, my Lords, I think that the regulations having been departed from by the Khedive, that vessel must be deemed to be in fault, unless the master produces a statutory exculpation and proves it to the satisfaction of the 910] court. That does not appear *to have been done in this instance. It follows that the course we must take will be to restore the judgment of the Court of Admiralty and to reverse that portion of the decree of the Court of Appeal which exempts the Khedive from liability. The motion which I should suggest to your Lordships, if you see fit to accede to it, would be, that the decree of the Lords Justices be reversed so far as it exempted the Khedive from liability and so far as it relates to paying the costs of the proceedings below; and that the order of the Court of Admiralty be restored.

[After consulting with Lord Blackburn his Lordship added:] My Lords, the motion I have to make is this: To reverse the order of the Court of Appeal so far as it alters or varies the decree of the Court of Admiralty; to restore the judgment of the Court of Admiralty, and to give the costs of the appeal in this House to the successful party, the appellants.

Decree of the court below complained of reversed so far as it varies the decree of the Court of Admiralty, and the judgment of the Court of Admiralty restored: the appellants to have their costs of the appeal to this House.

Lord's Journals, 23d July, 1880.

Solicitors for the appellants: *Clarkson, Son & Greenwell.*
Solicitors for the respondents: *Freshfields & Williams.*

As to the effect of observance or non-observance of sailing regulations in cases of collision, see 2 Eng. Rep., 156 note.

Canada, Lower: The Clara Killam, 2 Quebec L. R., 56.

English: Morgan v. Line, 11 Moore

P. C., 807; The American, L. R., 6 P. C., 127, 11 Eng. R., 75; The Panther, 1 Spinks, 31.

Michigan: Billings v. Breing, 45 Mich., 65.

New York: Hoffman v. Union Ferry Co., 47 N. Y., 176, S. C., second ap-

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peal, 68 id., 385; *Silliman v. Lewis*, 49 id., 379; *Lambert v. Staten Island*, etc., 70 id., 104; *Blanchard v. New Jersey*, etc., 59 id., 292; *Whitehall Transportation Co. v. New Jersey*, etc., 51 id., 369.

Pennsylvania: *Bigley v. Williams*, 80 Penn. St. R., 107; *The Scottish Bride*, 8 Philadelphia, 151; *Delaware*, etc., v. *Starrs*, 69 Penn. St. R., 36.

United States, Supreme Court: *The Civilta*, 108 U. S., 699; *The Ariadne*, 18 Wall., 475, 479; *The Pennsylvania*, 19 id., 125.

United States, Circuit and District: *The Favorite*, 10 Bissell, 536; *The Gray Eagle*, 1 id., 476, affirmed 2 id., 25; *The Sunnyside*, 6 Amer. L. T. Rep., 277, 5 Benedict, 152; 1 *Brown's Adm.*, 227.

*[5 Appeal Cases, 911.]

H.L. (L.), July 18, 27, 1880.

[HOUSE OF LORDS.]

***THE DIRECTORS, &c., OF THE LONDON GUARANTIE [911] COMPANY, Appellants; and BENJAMIN LISTER FEARNLEY, Respondent.**

Condition Precedent.

F. who was about to employ M. in a situation of trust and confidence, effected a policy with a Guarantie Company to secure himself against fraud by embezzlement of money by M. The policy, which was for £1,000, declared that "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy," the company undertook to reimburse any pecuniary loss sustained by the employer from "the fraud or dishonesty of the employed, as should amount to embezzlement of money, as should be discovered within three months of the death, dismissal, or retirement of the employed." The employer was to give notice of the claim, and proofs were to be given such as the directors for the time being might require. Then followed this proviso: "Provided that the employer shall if, and when, required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement, by the employed, or by his estate, of any moneys which the company shall have become liable to pay." F. claimed under this policy a sum of money alleged to have been lost by M.'s embezzlement. The directors pleaded that they had required F. to prosecute M., but that F. had not done so. Demurrer, because it did not appear that there was any obligation for F. to prosecute M., or that the non-performance of any such obligation, was a condition precedent to F.'s right to recover.

Held, reversing the judgment of the court below (*THE LORD CHANCELLOR* (Lord Selborne *diss.*), that the proviso did constitute a condition precedent, and furnished a defence to the action.

THIS was an appeal against a decision of the Court of Appeal in Ireland, made on the 25th of November, 1879, by which a previous decision of the Court of Exchequer there (the judges in the Court of Appeal being equally divided), was allowed to stand affirmed.

The action was brought to recover a sum of £1,000 upon a *guarantie policy given by the appellants, dated [912

8th of March, 1875, by which the plaintiff (the present respondent) was to be indemnified against any fraud or dishonesty (which should amount to embezzlement of money), which should be committed by one Frederick Marshall, then about to be employed by the plaintiff as manager of a tavern in Duke Street, Dublin. The policy was for one year, and one of the articles declared that, subject to the provisions in the memorandum of association, "and subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the said employer to recover under this policy, during the year from the date hereof, and during any year thereafter in respect of which the company shall consent to accept, and the employer shall pay, on the day of the date hereof, the aforesaid premium, the company shall at the expiration of three months next, after proof satisfactory to the directors of the loss herein mentioned has been given to the company, make good and reimburse to the employer to the extent of the sum designated in the margin hereof as the amount guaranteed, and no farther, such pecuniary loss sustained by the employer by reason of any fraud or dishonesty of the employed in connection with the duties hereinbefore referred to, as shall amount to embezzlement of money, and be committed and discovered during the continuance of the policy, and within three months from the death, dismissal, or retirement of the employed." Among other provisions in the policy was the following:

"Provided that, on discovery of the default or defalcation, the employer shall immediately give notice thereof to the company, and any claim made in respect of this policy shall be in writing, addressed to the company's chief office in London, within three months after such discovery; and the company shall be entitled to call for, at the employer's expense, such reasonable particulars and proofs of the correctness of such claim, and of the correctness of the statements made at the time of effecting, or desired to be made at any renewal of the policy, as the directors for the time being may require, and to have the same or any of them verified by statutory declaration." And no more claims than one, and that only in respect of acts or defaults committed within twelve months from the date of the receipt of the notice, 913] were to be made: "and *the policy was stated to be granted on condition that the business of the employer should continue to be conducted, and the duties and the remuneration of the employed were to remain in every partic-

ular with the statements before referred to ;” and if, during the continuance of the policy, any circumstance should occur, or charge be made, which shall have the effect of making the actual facts differ from the statements “previously made, without notice being given to the company, and the consent of the company being obtained thereto, or any suppression or misstatement should be made,” the policy was to be void. Then came this provision: “Provided that the employer shall, if and when required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and in consequence of which a claim shall have been made under the policy; and shall, at the company’s expense, give all information and assistance, to enable the company to sue for and obtain the reimbursement by the employed, or by his estate, of any moneys which the company shall have become liable to pay.”

An action was brought on this policy. Many defences were pleaded, but the seventh plea became the only one material to be considered. That plea was in the following form: “That though the plaintiff was required so to do by the defendants, yet he did not use diligence in prosecuting the said Frederick Marshall for the said fraud or dishonesty, which the plaintiff alleges he the said Frederick Marshall was so guilty of, as in the plaint stated, nor had the said plaintiff the said Frederick Marshall brought to trial.” The plaintiff demurred to this seventh defence on the ground that it did not “disclose any grounds of defence good in substance, and therefore the plaintiff demurs in law to the said defence, because it is not alleged therein, nor does it appear therefrom, that there was any obligation on the plaintiff to prosecute the said Frederick Marshall and bring him to trial for embezzlement, or that the non-performance of any such obligation was a condition precedent to the plaintiff’s right of action.”

The Court of Exchequer allowed the demurrer. On appeal *the judges were equally divided, and the [914 judgment of the court below stood affirmed ('). This appeal was then brought.

Mr. *Webster*, Q.C., and Mr. *J. C. Mathew* (Mr. *D. Fitzgerald*, of the Irish bar, was with them), for the appellants: The words of the contract declared that the conditions therein mentioned were to be conditions precedent—and in their very nature it was evident that they must be so. The

(') *Ir. Law Rep.*, 6 Q. B. Div., 219.

facts in *Bettini v. Gye* (¹), relied on in the court below, were not the same as here, for in that case there was no express stipulation that the stipulations in the contract should be conditions precedent, and the court thought that the conditions themselves did not go to the root of the matter; but all the reasoning in that case was clearly in favor of the appellants here. As to the facts, there was here a distinct declaration that the stipulations in the contract should be conditions precedent. The intention of both parties was therefore clear. And there could be no doubt that this particular stipulation did go to the root of the matter, and was therefore in its very nature a condition precedent: *Boone v. Eyre* (²); *Poussard v. Spiers* (³); *Cooper v. The London and Brighton Railway Company* (⁴). Even the communication of the name of a vessel in which goods had been shipped, *Graves v. Legg* (⁵); or the port where a ship is lying at the time of effecting a policy, *Behn v. Burness* (⁶); or the description given of an article sold, *Bowes v. Shand* (⁷), may amount to a condition precedent, though not so specifically described. What is or is not a condition precedent depends not on mere technical words, but on the plain intention of the parties: *Porter v. Shephard* (⁸); *Worsley v. Wood* (⁹); *Roberts v. Brett* (¹⁰). As to that intention in this case there could here be no doubt, for it was distinctly expressed, and the stipulation in question was one of a most material kind.

It was of no importance that the condition was in the 915] form of a *proviso, for a proviso might amount to a condition: *Co. Litt.* (¹¹); *Pordage v. Cole* (¹²); *Cutler v. Powell* (¹³).

The *Attorney-General for Ireland* (Mr. Law), and Mr. *McBlaine* (of the Irish bar), for the respondent: The seventh plea here does not sufficiently disclose a defence to the action. It shows no obligation on the part of the plaintiff to prosecute Marshall and bring him to trial before claiming payment under the guarantie, it merely alleges that he was required to prosecute but did not do so. The demurrer to it was therefore properly allowed. It does not matter that the parties have called certain stipulations by the name of conditions precedent. If they are not of that character they will not be enforced as such. Here they are not of that

(¹) 1 Q. B. Div., 183; 16 Eng. R., 276.

(²) 1 H. B. L., 273 n.

(³) 1 Q. B. Div., 410; 17 Eng. R., 93.

(⁴) 4 Ex. Div., 68; 31 Eng. R., 384.

(⁵) 9 Ex., 709.

(⁶) 3 Best & S., 751.

(⁷) 2 App. Cas., 455; 20 Eng. R., 80.

(⁸) 6 T. R., 665.

(⁹) 6 T. R., 710.

(¹⁰) 11 H. L. C., 337.

(¹¹) 1 Co. Lit., 203, n. 1.

(¹²) 1 Wm. Saund., 319, and n.

(¹³) 2 Sm. L. C., 4th ed., 1.

character. Some of them could not possibly be acted on till after the right to recover on the guarantie had come into force, and the title to maintain the action was complete. The stipulations in this case are of various characters, they constitute independent covenants not conditions precedent, and being so, they may form the ground for a cross-action but cannot be made a defence to this action itself: *Stavers v. Curling* (¹); *Phillips v. Foxall* (²); *Sanderson v. Aston* (³). There are various stipulations here of different degrees of importance, some of which could not possibly be conditions precedent, and there is nothing to give this one that particular character. It is a mere undertaking to do a particular act, one of a whole series of acts, but it cannot be treated as a condition precedent, the non-performance of which is to bar the right of action, for that would be to give it the character of a penalty, which it does not possess: *Kemble v. Farren* (⁴).

Mr. Webster in reply.

LORD BLACKBURN: My Lords, it has long been the practice of companies insuring against fire, for the purpose of their own security, to incorporate *in their policies, [916 by reference to their proposals, various stipulations for matters to be done by the assured making a claim before the company is to pay them, and (as the remedy by action for not complying with these stipulations would not afford them any protection) to make the fulfilment of those conditions a condition precedent to their obligation to pay. There was much controversy on the subject about a century ago; but since the case of *Worsley v. Wood* (⁵) it has been settled law that this mode of protecting themselves is effectual.

Those who prepared the policy for the company in the present case wished to do the same, but have not been happy in the words they have chosen for the purpose. So far as any of their stipulations, or, as the policy calls them, "conditions," are for something to be done preliminary to the completion of the proof, satisfactory (that is, which ought to be satisfactory) to the directors, from which completion of proof the time of the payment is to run, I think it is not disputed that they have effected their object. But such stipulations as relate to things to be done after payment is due are not, and cannot be, conditions precedent. The provision in question as to the employer, when re-

(¹) 3 Bing. N. C. 355.

(²) Law Rep., 7 Q. B., 666; 3 Eng. R.,

259.

(³) Law Rep., 8 Ex., 73; 4 Eng. R., 452.

(⁴) 6 Bing., 141.

(⁵) 6 T. R., 710.

an insuring company can claim the protection of the rule thus expressed is settled by the case of *Worsley v. Wood* (').

The effect of the general declaration that all the conditions of the policy shall be conditions precedent appears to me to be precisely the same as if a similar declaration had been repeated at the commencement of each proviso, and of each separate condition embodied in such proviso. I therefore take the case on the same *footing as if the parties had stipulated in these terms with regard to proviso 3: "That it shall be a condition precedent to the right of the employers to recover, that they shall, if and when required by the company, use all diligence in prosecuting the employed to conviction," &c., &c.

When the parties to a contract of insurance choose in express terms to declare that a certain condition of the policy shall be a condition precedent, that stipulation ought, in my opinion, to receive effect, unless it shall appear either to be so capricious and unreasonable that a court of law ought not to enforce it, or to be *sua natura* incapable of being made a condition precedent.

In the present case I am of opinion that, having regard to the character of the risk insured against, it would not be an unreasonable thing for the company to stipulate that, before admitting or being subjected to liability for the sum insured, the employers should, as a condition precedent to their right of recovery, use, if and when required, all possible diligence to prosecute the fraudulent person to conviction. But it is contended for Mr. Fearnley, the respondent, that, according to its sound construction, the stipulation which the parties have made in regard to a criminal prosecution of the employed cannot become a condition precedent to his right to recover, even by virtue of an express declaration to that effect. And that contention is undoubtedly well founded, if in the case of the insured's obligation to prosecute criminally, as in the case of his obligation to give information and aid in civil proceedings, the time of performance be, from the nature of the obligation, necessarily postponed until the directors of the company have admitted liability and paid the money.

It appears to me that the stipulations with respect to proceedings criminal and civil contained in the third proviso of the policy, constitute two distinct and separate obligations. They are so independent of each other that the company may require the performance of one of them only, and the insured, if required to perform both, might implement the one and leave the other unfulfilled.

(') 8 T. R., 710.

The words of the proviso do not fix any limit of time within which the obligation of the insured to institute a criminal prosecution must be performed; but it does not necessarily follow that *the obligation must be [920 treated as if its performance were referable to a period subsequent to the company's admission of liability. Although the proviso does not absolutely fix the time of performance, it provides that the insured shall proceed whenever required by the company, so that the contract of the parties leaves it entirely to the company to determine at what time criminal proceedings shall be initiated. Now, it appears to me that when that which is left indeterminate in a contract, whether it be time, or place, or *quantum*, becomes fixed and ascertained in the manner stipulated by the contracting parties, it must be treated just as if it had been an original term of the contract. And seeing that the directors, before admitting liability, did, in the exercise of their undoubted right, require the insured to fulfil the condition of the policy with respect to criminal prosecution, I am of opinion that it must be regarded as a condition precedent.

I have only this observation to add, that when, as in the present case, the parties to a contract make a stipulation in which nothing is expressed as to time, and which might, according to its own terms, be fulfilled either within or after the period during which it could operate as a condition precedent, and the parties then go on to declare that it shall be a condition precedent, I think the declaration must, *prima facie*, be held to be a sufficient expression of their intention to limit the time of performance to the antecedent period.

On these grounds I have, after much hesitation, formed an opinion that the judgments under appeal, in so far as these allow the demurrer to the appellant's seventh defence, ought to be reversed and the demurrer overruled.

THE LORD CHANCELLOR (Lord Selborne): My Lords, I have the misfortune to differ in this case from the opinions of my noble and learned friends.

It is admitted, and it is undeniable, that some of the provisos contained in the policy in this case are of a nature which makes it impossible that they should be conditions precedent to the liability of the company to pay the amount guaranteed in the event of such a loss as is contemplated by the policy. The express declaration, therefore, that the policy is granted "subject to the *conditions herein [921 contained, which shall be conditions precedent to the right on the part of the said employer to recover under this policy," can have no greater effect than this, that such of

the subsequent provisos as, according to their true intent and meaning (to be collected in the usual manner upon a sound construction of the whole instrument), may be restricted to things to be done on the part of the employer before any right of action accrues to him under the policy, are to be conditions precedent of the right to recover.

Now the contract of the company is, that subject to such conditions precedent, they will, "at the expiration of three months next after proof satisfactory to the directors of the loss hereinafter mentioned has been given to the company, make good and reimburse to the employer" (to the extent of £1,000) "such pecuniary loss sustained by the employer by reason of any fraud or dishonesty of the employed in connection with the duties before referred to, as shall amount to embezzlement of money, and be committed and discovered" within the time therein limited.

One test of the question to be now determined appears to me to be, whether the "proof satisfactory to the directors," within three months after which the liability of the company is to become absolute, does or does not include that sifting of evidence, which might take place by means of criminal proceedings against the person charged with embezzlement, in a case in which the company may require a prosecution? It might perhaps have been quite reasonable if it had been so; though, if proofs which (in the opinion of a court of justice) ought to be regarded as satisfactory had been already furnished to the directors, it would by no means necessarily follow that the claim against the company would fail, because a prosecution might not succeed. But an intention that the directors should be at liberty to insist upon a criminal charge, prosecuted to conviction or acquittal, as part of the "satisfactory proof" which they are entitled to require is, at all events, not expressly declared; and the position and context of the proviso as to prosecution, and the terms and effect of the provisos which precede it, do not appear to me to favor the view that it was, in fact, introduced with that intention.

The whole subject of the "proof" to be given to the company 922] is dealt with by one of those earlier provisos, which is certainly a condition precedent of the company's liability.

Notice of the discovery of any fraud or defalcation insured against is to be given to the directors; who are to be "entitled to call for, at the employer's expense, such reasonable particulars and proofs of the correctness" of the claim, "as the directors for the time being may require, and to have

the same, or any of them, verified by affidavit." If, for the more complete establishment of such proofs, it had been intended to stipulate that they should be verified or sifted by proceedings in a criminal trial this would have been the natural place to say so. But the subject of proof is not here any farther pursued. Other conditions precedent, unconnected with that subject, are interposed before we come to the proviso as to prosecution.

That proviso consists of a single sentence, divisible into two clauses, both of which are governed, grammatically, by the same introductory words: "Provided that the employers (1) shall, if and when required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) which he shall have committed, and in consequence of which a claim shall have been made under this policy; and (2) shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed, or by his estate, of any moneys which the company have become liable to pay." The second of these claims cannot be a condition precedent of the company's liability, because it can only come into operation after the liability has become absolute. This being so, it would, I think, be a somewhat forced and violent construction to treat the former clause of the same sentence as a separate proviso, and as a condition precedent, when the latter clearly is not. That clause, according to the natural import of its words, gives the directors a right, at any reasonable time, either before or after acceptance of the proofs offered by the employer, and either before or after payment of the claim, to require the employer to prosecute. If it were a condition precedent, it must necessarily be restrained to the period before the proofs have been accepted as satisfactory, or at the *latest to three months after that period, [923 which might not give sufficient time for a criminal trial. One of your Lordships, if I understand rightly, appears to think that it may be held to operate as a condition precedent when the employer is required to prosecute before the acceptance of the proofs as satisfactory, or before the lapse of the three months: and that it may also entitle the directors to require a prosecution at a later period, when it cannot so operate. I must own that this is not in accordance with what I have hitherto understood to be the law. I have always understood that a condition cannot be construed to be precedent unless it is so necessarily, and under all the circumstances to which it can apply.

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If the first clause is read in its natural connection with the second, both seem to be relative and subsidiary to one object, viz., the reimbursement to the company of so much of the amount for which the company is liable, as the defaulter may have property to satisfy. That may not be a very hopeful matter, but it is evidently one for which the directors thought it worth while, and intended, to take security by this proviso, which is immediately followed by another proviso for a somewhat similar object, viz., that of securing to the company the benefit of any other guaranties or securities for the defaulter which the employer might hold. The prosecution of the defaulter to conviction might, under clauses 4, 14, and 15, of the Forfeiture for Treason and Felony Act, 1870, facilitate the recovery of all or part of the loss from his property or estate if he had any; and another reason for enabling the directors to insist (with the same object in view) on a prosecution may have been that, according to an opinion which (whether well-founded or not) has been widely prevalent, a voluntary neglect to prosecute might have been supposed to be an impediment to a civil remedy against the defaulter or his estate.

I am of opinion that this proviso ought, upon the proper construction of the whole policy, to be deemed to have been inserted for these, and only for these, purposes, and not as a condition precedent, and therefore I think that the judgment under appeal is right. But as both my noble and learned friends who have preceded me are of a different opinion, their opinion must of course prevail.

924] *I understand, my Lords, that costs must be mentioned. Although I have the misfortune to differ in opinion from my two noble and learned friends, yet looking to the circumstances and the nature of the case, I am by no means of opinion that any exception should be made in this case to the general rule that the costs should follow the event.

Judgment of the Court of Appeal in Ireland reversed in so far as it affirms so much of the order of the Court of Exchequer in Ireland of the 6th June, 1877, as allows the demurrer to the seventh defence: Declared that the demurrer to the seventh defence ought to have been, and is, overruled. Respondent to pay the costs in this House and in the court below.

Lords' Journals, 27th July, 1880.

Solicitors for the appellants: *Holmes, Anson & Greig.*
Solicitor for the respondent: *W. Bell.*

Where the plaintiff seeks to recover of the defendant for non-performance of a contract, he must allege and show performance on his part of all concurrent or prior acts. Neither of the parties to a mutual contract can recover against the other for a breach thereof, or put the other in default without a tender of performance on his part, or showing a willingness and ability to perform, and that actual performance was prevented or expressly waived by the other : *Danham v. Mann*, 8 N. Y., 508 ; *Lester v. Jewett*, 11 id., 453 ; *Smith v. Wright*, 1 Abb., 248 ; *Fickett v. Brice*, 22 How. Pr., 194, 197 ; *Fry v. Johnson*, id., 816, 824-5 ; *Baker v. Higgins*, 21 N. Y., 897 ; *Nelson v. Plimpton*, etc., 55 id., 480, 484 ; *Hubbell v. Van Schoening*, 49 id., 326 ; *Turner v. Muller*, 59 Mo., 526 ; *Hapgood v. Shaw*, 105 Mass., 276 ; *Gray v. Schooley*, 43 U. C. Q. B., 209, 212 ; *Lakin v. Nuttall*, 3 Can. Sup. Ct. R., 685.

Though a party may waive strict performance and accept part of the articles to be delivered : *Avery v. Wilson*, 81 N. Y., 841.

If one agreeing to convey real property remove fixtures before offer of performance, he is not entitled thereto, even on payment of the value of the fixtures : *Smith v. Sturges*, 55 How. Pr., 860.

When the covenant to convey free from incumbrance, and the covenant to pay the purchase-money are mutual and dependent, the purchaser may rescind and recover back his deposit of purchase-money without proving a tender of the balance, if the vendor by reason of incumbrance on the land was not prepared to make title as required by the contract : *Morange v. Morris*, 3 Abb. Dec., 314, affirming 34 Barb., 811.

Though the incumbrances be only taxes and assessments, if the vendor does not cause them to be discharged, the purchaser is not bound to accept title ; and his objecting to accept title on another and insufficient ground does not waive this objection : *Morange v. Morris*, 3 Abb. Dec., 314, 3 Keyes, 48, affirming 34 Barb., 811 ; *McCool v. Jacobus*, 7 Rob., 115.

See *Hinckley v. Smith*, 51 N. Y., 21 ; *Kerr v. Purdy*, id., 629.

A tender of performance need not be made when it would be wholly nugatory, and the existence of an incum-

brance at the time fixed in the agreement for the execution of a deed is a breach of the vendor's covenant, which puts it out of his power to perform, and excuses the purchaser from tendering performance : *Karker v. Haverly*, 50 Barb., 79.

Defendant agreed to give plaintiff a warranty deed of a house, and the plaintiff agreed to pay for the same \$3,400 ; two thousand when the house was finished ; balance to remain on a mortgage ; plaintiff tendered the \$2,000 and defendant absolutely refused to convey the house : Held, that it was not necessary that plaintiff should tender a mortgage executed by himself, or a deed to be executed by the defendant : *Scanlan v. Geddes*, 112 Mass., 15 ; *Karker v. Haverly*, 50 Barb., 79.

See *Hinckley v. Smith*, 51 N. Y., 21 ; *Kerr v. Purdy*, id., 629 ; *McCool v. Jacobus*, 7 Rob., 115.

Specific performance will be decreed although there were unsatisfied liens on the premises when the title was to be closed, if, at that time, the holders of the liens attend with the vendor, ready and willing to satisfy their liens simultaneously with the closing of the title. All that a purchaser can claim is that, when he parts with his money, he shall receive the title subject only to such liens as he agreed to assume, and when the holders of other liens are in attendance to discharge them simultaneously with the passing of the title, he will, upon completing the agreement on his side, get what he bargained for : *Rinaldo v. Hausmann*, 52 How. Pr., 190, 1 Abb. N. C., 312 ; *Karker v. Haverly*, 50 Barb., 79.

But see *Hinckley v. Smith*, 51 N. Y., 21 ; *Kerr v. Purdy*, id., 629.

The existence, at the time for performance, of a lien previously unknown to the vendor, who then immediately offers to pay it or to allow the purchaser to deduct the amount from the purchase-money, is not a good ground for refusing to take title : *Pangburn v. Miles*, 10 Abb. N. C., 42.

Land that, without the owner's knowledge, was under attachment, was sold by auction, ten days being "allowed to examine the title, within which time the property must be settled for at the office of the auctioneer." The attachment was not discharged within the ten days, but within that time the

purchaser had written to the auctioneer, declining "to proceed further in the matter," as he considered "the whole proceeding invalid." In an action against the purchaser for a refusal to complete the contract, held that, as the vendor was bound to give a good title only upon compliance with the terms of the sale within ten days, the purchaser's letter was a waiver of his right to object to the attachment as an incumbrance.

Land was sold by auction, a sum of money to be paid "on the spot, which will be forfeited to the seller if the terms and conditions are not complied with, but the forfeiture of said money does not release the purchaser from the obligation to take the property." In an action against the purchaser for not taking the property; held, that the money paid at the sale should be considered by the jury in reduction of damages: *Curtis v. Aspinwall*, 114 Mass., 187.

The defendant agreed with the plaintiffs to sink an artesian well at seventy-five cents a foot. After sinking a distance of one hundred and sixty feet, he met with an impediment and refused to proceed further. Held, that he was entitled to payment for the work done, as the evidence did not show an agreement that he should receive nothing unless he succeeded in finding water: *Barry Gas Co. v. Sullivan*, 5 Ontario App. R., 110.

On an agreement to deliver stocks in the future, stocks "watered" after the agreement will be a compliance with the terms of the contract: *Currie v. White*, 6 Abb. (N.S.), 352.

Vendor not liable for non-delivery unless vendee has properly tendered or offered performance on his part. It is not necessary that he should produce and tender the money. But, if he does not produce the money, but merely offers to pay on delivery, stating his readiness and ability to do so, he must go farther and show facts confirming the truth of his statement.

His mere statement that he would pay and was able to pay, is not of itself sufficient for *not tendering or offering performance by vendee*. A statement by the vendor *before* the expiration of the time for delivery to the vendee, in response to a request to hurry up the delivery, that he was *unable to*

get the goods, does not furnish such excuse.

A statement made by vendor *after* the expiration of the time for delivery, in answer to the demand of the vendee's agent for a delivery, that he was unable to obtain the goods, at the same time *expressing doubts as to the vendee's credit*, does not furnish such excuse: *Goodrich v. Sweeny*, 86 N. Y. Sup. Ct. R., 320.

Under a contract for the sale of merchandise, by which the seller was entitled to receive payment in notes of a third person, as he made part deliveries, the buyer, after a part delivery, refused to give the notes, on the ground alone that he was merely an agent in making the purchase.

Held, that this was a breach on his part which waived his right to demand the rest of the goods, and entitled the seller to recover for what he had delivered, without further performance: *Partridge v. Gildermester*, 8 Abb. Dec., 461, affirming 6 Bosw., 57.

D. agreed in writing to deliver to L. a certain quantity of iron ore, at a specified price per ton, "on the landing at C.," and gave him an order therefor, and L. brought an action on the agreement, alleging that D. refused to deliver the ore. Held, it is competent to show that by the settled, uniform usage at C., well known to the parties when they contracted, one holding such order is entitled to have the ore taken from the pile on the landing and placed in his boats; that ore is not permitted to be removed, nor is it practicable to remove it, in any other manner; and that the ore is weighed when it is carried in the boats to its destination, and then payment therefor is made.

In an action for refusing to deliver ore, prosecuted on an agreement in the same form, it appeared that the seller resided at another place, where he refused to deliver such order, and informed the purchaser that he would not comply with the agreement. Held, that it was not necessary for the purchase, after such refusal by the seller, to take boats to C. for the ore, or demand the ore at C., the purchaser being able and willing to comply with such agreement as it existed in view of the usage: *Steel Works v. Dewey*, 37 Ohio State, 242.

A sale of goods "to arrive" is a mere executory contract, conditional on their arrival, and the purchaser may reject a partial, and insist upon a full performance of the contract. If less than the amount contracted for arrives, he is not bound to accept that as a performance: *Reimers v. Ridner*, 2 Rob., 11.

A party is bound to deliver according to the terms of his agreement, although it be to deliver spirits under an existing law, and the secretary of the treasury, under its provisions, suspend the law so that the spirits are subjected to a higher duty: *Baker v. Johnson*, 2 Rob., 570, affirmed 42 N. Y., 126.

On an agreement to sell and deliver a cargo of about nine thousand bushels of barley, the purchaser is not bound to accept a cargo of less than about that number of bushels; but if a smaller cargo be accepted it must be accepted as a full, and not a part performance: *Flanagan v. Demarest*, 3 Rob., 178.

See *Bradley v. Wheeler*, 4 Rob., 18.

Under an agreement to convey a piece of land "to be occupied for a Jewish synagogue," the grantees are entitled to a deed, in which the use is incorporated as a condition merely, and not to one running with the land, rendering them liable to damages if it be not so used: *The Congregation, etc., v. Halliday*, 3 Rob., 886.

Under an agreement that the lessor is to complete certain repairs by the 14th of June next, and that, in consideration of these conditions being fulfilled, the lessee is to take the property for three years at an annual rent, the repairs must be completed by the time specified, or the lessee is not bound to take the premises. If the vendor absolutely refuses to perform, the vendee need not show readiness or a tender of the purchase price: *Tidey v. Mollett*, 16 C. B.(N.S.), 298, 111 Eng. C. L., (overruling *Stratton v. Pettit*, 16 C. B., 420, 81 Eng. C. L.); *Lafarge v. Mansfield*, 31 Barb., 345.

But in other cases he must aver and prove such a tender: *Anderson v. Sherwood*, 56 Barb., 66.

If tender or offer of performance was for any reason excused or unnecessary, such facts, and not a tender or offer, should be alleged: *Oakley v.*

Morton, 11 N. Y., 25; *Baldwin v. Munn*, 2 Wend., 399; *Laraway v. Perkins*, 10 N. Y., 371.

But see *O'Leary v. Board*, 9 Daly, 161, reversed 93 N. Y., 1.

But the court has power to allow an amendment and permit the evidence to be given: *Halsey v. Black*, 28 N. Y., 438, 26 How., 97; *Van Buskirk v. Stow*, 42 Barb., 9.

On a sale for cash, it is not a sufficient tender of performance to offer the seller's note: *Leven v. Smith*, 1 Denio, 571.

The rule in such case is different from that where a debt is actually created, the debtor agreeing not to plead a set-off. On a sale for cash, the seller is not bound to part with his property until a compliance with the contract by the purchaser.

If a contract be assigned, the tender must be to the assignee and not the assignor: *Dustan v. McAndrew*, 10 Bosw., 130; *Cook v. Kelley*, 9 id., 358.

If one party is to do an act before the other is required to do something else, the failure or neglect of the former is a waiver of an offer to perform by the latter: *Thorp v. Ross*, 4 Keyes, 546.

See 29 Eng. Rep., 110 note; *Niblo v. Binsse*, 3 Abb. Dec., 375; *Weeks v. Little*, 89 N. Y., 566, 11 Abb. N. C., 415, reversing 47 N. Y. Superior Ct. R., 1; *Hamilton v. Moore*, 33 U. C. Q. B., 275; *Vermont, etc., v. Brose*, 104 Ills., 206.

See also *Mansfield v. N. Y. Cent. R. R.*, 16 N. Y. Weekly Dig., 275, 28 Hun, 512 mem.

As to profits of a contract, *Tredagar v. Girigud*, 1 Cababe & Ellis, 27.

If delayed by a preceding contractor the party, if he enters upon his work, must proceed after he enters upon his work without unnecessary delay: *Granson v. Tobey*, 75 Ills., 540; *Inter-Ocean, etc., v. Sheriffs*, 54 Wisc., 202.

As to prepare a building for mason work, to furnish plans and set out work: *Roberts v. Bury Commissioners*, L. R., 5 C. P., 310, 325, reversing same case, L. R., 4 C. P., 755.

Otherwise if the party agree to do what shall be required by an architect within a given time, under a certain penalty for each day thereafter if it was not completed, even though he require an impossibility, for it was the

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party's own folly to make such an agreement: *Jones v. St. John's College*, L. R., 6 Queen's Bench, 124, 126.

It seems to us, however, that the agreement to make such alterations as might be required should have received a reasonable construction, and to have been held to require such only as could reasonably and properly be made, after being required, within the time specified.

If a contractor sustain damages by being compelled to pay higher wages in consequence of a building not being ready for his portion of the work by

the time agreed upon, he may recover such damages: *Allamon v. Mayor, etc.*, 43 Barb., 83.

Although the vendor deliver the part of a lot of goods sold and the vendee accept them, the vendor cannot recover therefor without full performance or an offer thereof: *Moses v. Banker*, 2 Sweeny, 267.

If one agree to make three models, he cannot recover for one made and delivered without offering to deliver two more: *Sharpe v. Johnson*, 41 How., 400.

[5 Appeal Cases, 925.]

H.L. (Sc.), June 10, 1880.

[HOUSE OF LORDS.]

925] *BROWNLIE, *Appellant*; CAMPBELL and Others, *Respondents*.

Scotch Conveyance—Sales of Heritable Estate—General Clause of Warrandice—Collateral Representation—Concealment.

Articles of roup of certain lands expressly stipulated that the purchaser was to take the property with all risks of error in the particulars. A. agrees by missives attached to the articles of roup to buy the estate, and a conveyance was executed containing a clause of warrandice in the usual general terms. Neither the disposition nor the articles of roup contained any information as to the tenure of the lands. The particulars of sale contained this statement: "The lands hold of the Crown," and in answer to an inquiry made before the sale on behalf of A. as to the nature of the holding, the sellers' agents referred A. to the note of particulars, adding: "The proprietors" (B. & C.) "are not entered with the Crown, but you are aware the Crown never asks for an entry." The foundation for the belief that the lands were held direct of the Crown rested on a decree of tinsel, dated 1813, directed against the heir of line of the last superior, and a decree of forfeiture of the mid-superiority, dated 1849, followed by a Crown charter. From 1813 there had been no assertion of a contrary right.

Immediately before the sale the agents for D., the disponee of the last superior, wrote to B. & C.'s agents claiming the right of mid-superiority, but this claim on its being disputed and not further persevered with, B. & C.'s agents did not intimate to A. Two years later D.'s agents renewed the claim, and ultimately raised an action against A., claiming a year's rent as composition on his entry. A. was found liable, and the decree of forfeiture was reduced.

A. thereupon raised this action against B. & C. for repetition of the sum paid, the expenses of the litigation, and a sum equal to one and a half times the casualty of composition, on the ground, (1), of warrandice, and, (2), misrepresentation and concealment on the part of B.'s agents:

Held, affirming the decision of the court below, that there had been no breach of warrandice; and that the representation was perfectly true according to the knowledge and belief of those who made it, and, that being so, any error therein was covered by the express contract of the purchaser to take the property with the risks of errors in the particulars.

[6 Appeal Cases, 1.]

H.L. (E.), July 22, 23, 26, 27; Nov. 27, 1880.

[HOUSE OF LORDS.]

***DUNCAN, FOX & Co., and ROBINSON & Co., *Appellants*; and THE NORTH AND SOUTH WALES BANK, S. C. RADFORD, RADFORD & SONS, and BALFOUR, WILLIAMSON & Co., *Respondents*.**

Bill of Exchange—Indorser—Surety—Securities.

The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor.

He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities.

The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship.

S. C. R., one of the partners of S. R. & Sons, in December, 1874, deposited with the N. & S. W. Bank the title deeds of two of his own freehold properties, *and [2] signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W. Bank might advance to the firm in the way of discounts.

In November, 1875, D. & Co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest which was declined. D. & Co. were customers of the N. & S. W. Bank. R. & Sons said if D. & Co. would inquire of those bankers they would find it would be all right with the R. bills. The bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than a nominal liability by putting their names on the bill. D. & Co. thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, R. & Sons stopped payment. The bill became due in February, and was dishonored. D. & Co., who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills, brought an action against the N. & S. W. Bank to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill:

Held, that D. & Co. were sureties on the bill, and that as such they were entitled to the benefit of these securities.

THE two firms of the appellants carried on business at Liverpool as merchants. They were not connected together in business, but the transactions of both with the Radfords were exactly of the same kind. It will be sufficient to refer to one alone.

Radford & Sons were millers and corndealers at Liverpool, the firm consisting really of Samuel Collins Radford and James Radford.

The Radfords were not strictly the customers of the North and South Wales Bank, but had opened a discount account

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with it, and were indebted to it in respect of discounts of bills of exchange. This discount account was considerable.

On the 1st of December, 1874, Samuel Collins Radford deposited with the bank certain deeds of freehold property belonging to himself, for the purpose of securing payment of the amount then due, and to become due, on discounts, from his firm to the bank. The deposit was effected by two memorandums, one of which, executed by Mr. S. Collins Radford alone, stated that the deposit was made "in pledge to secure to the said bank the balance, for the time being, owing to the said bank by my firm of Samuel Radford & Sons for discounts and advances, and for all other moneys in or for which the said firm, whether alone, or jointly with 3] *any other person or persons, were, or might, from time to time thereafter be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm." The second memorandum relating to other property of S. C. Radford was in a similar form.

In November, 1875, Duncan & Co., through their brokers, Maxwell & Co., sold to S. C. Radford & Co. a cargo of wheat *ex Riam* for cash after delivery. Part of the price was paid in cash, but James Radford applied to Mr. Duncan to take the acceptances of Radford & Sons for the residue. Duncan at first declined to do so, on which James Radford said, "You bank with the North and South Wales Bank, if you go there you will find it will be all right with our bills," to which Duncan answered, "If the bank will accept those bills without our indorsement, then I can oblige you." Mr. Duncan went to the bank and saw the manager, who declined to discount the bills without the indorsement of Duncan & Co., stating that it was contrary to all banking customs to discount bills for any one who did not indorse them; he added that he did not think that Duncan & Co. would incur more than a mere nominal responsibility by making the indorsement—or something to that effect. Mr. Duncan thereon informed Radford that he would consent to take the bills, which he did, and then indorsed them and handed them to the bankers, who discounted them, placing the amount to the credit of Duncan & Co. At that time Duncan & Co. had no knowledge that the bankers held any securities from Radford. In January, 1876, before any of the bills became due, Radford & Sons stopped payment. When the bills became due they were presented for payment; they were dishonored, and Duncan & Co. became liable to the bankers for the amounts. They

received formal notice of the dishonor, and a demand of payment. There were other bills of Radford & Co. held by the bankers under similar circumstances on which Robinson & Co. were indorsers, all of which became due between the 22d of February and the 27th of March. On the 24th of February, 1876, Radford & Co. executed a deed of inspection. The bankers made the property deposited with them available for the purpose of covering their claims, and if the bills in question were not included in the general balance, that balance would be *satisfied, but if they were [4 included in it, the bankers would still be creditors of Radford & Co. upon the bills. Messrs. Duncan & Fox admitted their liability on the bills; but (having in the meantime heard of the securities held by the bankers) contended that they were entitled, in calculating the amount due upon the bills, to the benefit of these securities, for that they, Duncan & Fox, being merely, as between themselves and the bankers, sureties on the bills, they were entitled to the indemnity afforded by the securities which the principals on the bills, Radford & Co., had placed in the hands of the bankers.

The appellants, after coming to a knowledge that the bankers held securities to cover discounts and balances, applied to them to realize these securities and apply the proceeds in payment of the amounts due on the bills, or to render to the appellants an account of what was due from Radford & Sons, and, on payment of the same by the appellants, to transfer to them the securities for the same amount remaining in their hands. Balfour, Williamson & Co., and the other unsecured creditors, claimed to have the securities paid over to the inspectors for general distribution under the deed. The bankers declined of themselves to adopt either claim, and required the direction of a court.

An action was thereupon brought by Duncan & Co., in the Chancery Court of the County Palatine of Lancaster, to determine this question. Messrs. Balfour, Williamson & Co., creditors of the Radfords, were joined as defendants representing the creditors in general. The Vice-Chancellor (Mr. Little) on the 10th of May, 1878, decided in favor of the claim made by Duncan & Co. The decree, dated the 28th of May, 1878, declared that the appellants were sureties for the payment by the Radfords of the balance due in respect of the bills held by the bankers, and that the equitable mortgages of the 1st of December, 1874, extended to such bills of exchange and to all other acceptances of the Radfords held by the bankers, whether discounted by the Radfords

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or for third parties, and relief was given to Duncan & Co. upon the principle that they were entitled to the benefit of the securities so deposited with the bankers. On appeal, this decree was ordered to be reversed and the action dismissed with costs (*). This appeal was then brought.

5] *Mr. *E. E. Kay*, Q.C., and Mr. *W. F. Robinson*, Q.C. (Mr. *Ralph Neville* was with them), for the appellants. The appellants here bore the character of sureties to the bank for the payment of these bills, and, in that character, were liable on the bills, *Byles on Bills* (*); and were therefore entitled to any benefit from securities held by the bankers which would diminish the amount of the liability they had incurred. If the acceptors, who were the persons primarily liable, the real principals on the bills, failed to pay them, the appellants made themselves liable as indorsers, *Suse v. Pompe* (*), that is, as sureties. If the indorsers discharged that liability they then became entitled to sue the acceptors—and, suing them, to take their property in execution. Part of that property would be the securities left in the hands of the bankers, who, if they received payment of the bills from the sureties, the indorsers, could have no right to retain, as against them, the securities which had been deposited to cover the debt of the acceptors which they had satisfied. The right of a surety to be indemnified out of the property of the principal was undoubted, *Byles on Bills* (*); and was not lessened by the fact that, as between the principal and the surety, the liability arose with relation to a bill of exchange. The deposit agreement under which the securities were given was collateral to the bills and could not affect the rights of the parties to those bills, *Byles on Bills* (*); it did not amount to giving time to the acceptor, *Pring v. Clarkson* (*), and therefore could not discharge the indorser, for the mere giving of additional security by the principal will not discharge a surety, though giving time to the principal on account of that security, without notice to the surety, will have that effect: *Overend & Gurney v. The Oriental Financial Corporation* (*).

In a transaction of this kind the security given on the bills would be strictly confined to the bills themselves, even in the hands of the bankers, and, the bills being satisfied, 6] those who had *been liable upon them became entitled to the securities: *Latham v. The Chartered Bank of*

(*) 11 Ch. D., 88.

(*) 13th ed., ch. xviii, 245.

(*) *Byles on Bills*, 13th ed., 154; 30 L. J. (C.P.), 75; 8 C. B. (N.S.), 538.

(*) 13th ed., 249-258.

(*) 13th ed., 101; *Webb v. Salmon*, 13 Q. B., 886; 3 H. L. C., 510.

(*) 1 B. & C., 14.

(*) Law Rep., 7 H. L., 348; 3 Eng. R., 1.

India ('). In *Praed v. Gardiner* (') A. lodged certain securities in the hands of B. his creditor; A. afterwards incurred a fresh debt with B., for the payment of which C. became security. A. became bankrupt, and B. called on C. to pay the second debt. The securities being more than sufficient to pay the first debt, C. was held entitled to the benefit of the surplus in reduction of the second debt. The indorser, who, as to the holder of the bill is surety for its payment, has not only a right to the benefit of securities in the hands of the holder, but, if the holder is a debtor to the principal, has a right to the benefit of set-off in respect of such debt: *Bechervaise v. Lewis* ('). There the payee suing a person whom he knew to have joined in a promissory note merely as a surety, the latter pleaded a set-off of a sum due from the payee to the acceptor, and the plea was held good. The judgment of the court was delivered by Mr. Justice Willes, who in the course of it stated ('): "A surety has a right as against the creditor, when he had paid the debt, to have for reimbursement the benefit of all the securities which the creditor holds against the principal. The surety has another right, namely, that as soon as his obligation to pay becomes absolute he has a right in equity to be exonerated by his principal." That case the more directly applies here, for here the bankers knew perfectly well that the appellants only indorsed the bills as sureties. The same principle had already been declared by the Exchequer Chamber in the case of *Holmes v. Kidd* ('). That principle had been explained in *Younge v. Reynell* (') to be derived from the obligation under which the principal debtor lay to indemnify the surety, and Vice-Chancellor Wood in *Newton v. Chorlton* ('), declared that the surety was not to have his position deteriorated by any arrangement between the principal debtor and the creditor. Though, therefore, the appellants here knew nothing of the deposit of the securities at the time they became sureties on the bills, it was clear upon all the authorities that they were, in equity, entitled *to the benefit of those securities as an indemnity [7 against the liability they had incurred.

Mr. *Benjamin*, Q.C., and Mr. *A. G. Marten*, Q.C. (Mr. *F. Thomson* was with them), for the respondents: There had not been anything done here which could in any manner

(1) Law Rep., 17 Eq., 205; 7 Eng. R., 771.

(2) 2 Cox, 86.

(3) Law Rep., 7 C. P., 372; 2 Eng. R., 684.

(4) Law Rep., 7 C. P., at p. 377.

(5) 3 H & N., 891.

(6) 9 Hare, 809.

(7) 10 Hare, 646.

vest especial rights in the appellants. They were altogether strangers to what had passed between S. C. Radford and the bankers, and the securities given by him were expressly made liable only to what his firm might owe to the bankers. The appellants were the persons who brought these bills to the bankers, and who had, on their own account, and for their own benefit, obtained from the bankers the amount of the bills. They had therefore made themselves, so far as they and the bankers were concerned, principal debtors. Under no pretence did the circumstances here warrant them in assuming the character of sureties, nor could the ordinary rules applicable in the case of principal and surety be applied in this case. So to apply them would be disastrous to mercantile transactions. The appellants knew nothing of the securities deposited by S. C. Radford, and had not made themselves liable because of those securities, or on account of any reliance placed on them. The appellants had been told that it was probable their liability would be merely nominal, and they had chosen to incur the chance in order to obtain a present benefit. They had become liable to the bankers as principals on the bills, and were so liable at the moment when the Radfords stopped payment. At that time the only question as to the benefit to be obtained from the deposited securities was one which might arise between the bankers and the Radfords, but with no one else. When the bankers' claims were satisfied, the property given to them as security for their possible advances to the Radfords, ought to be returned to those who gave it. In that way it would become liable to the general creditors of the firm—and for the benefit of those creditors vested in the trustees appointed under the deed of inspection. As general creditors the appellants might possibly claim to participate in the benefit of these securities, but only in that character, and could not specially claim the exclusive advantage of them, for they were not sureties *but principal debtors on these bills, which had been discounted at their own request and for their own advantage. [LORD BLACKBURN: Were they not sureties to this extent—that if the acceptors paid the bills they were free, but if the acceptors did not pay the bills, they undertook to do so.] They undertook to pay the bills because they received the amount for their own use, and were in that way principal debtors. Under the special circumstances of the case they could not be said to bear any other character. The cases therefore where no such special circumstances existed did not apply

to the present. As to the case of *Praed v. Gardiner* (¹), no argument could properly be deduced from it, for the decree there appeared only to be a marshalling of securities held by the creditors according to the different equities of the persons entitled to redeem them; there was no sufficient explanation of the case, and the grounds of the judgment were not stated.

This action was premature. The appellants had not paid the bills, which were still held by the bankers, and on that ground could not maintain this action, for there was nothing to entitle them to proceed here on the *quia timet* principle: *Antrobus v. Davidson* (²).

Sir *H. Jackson*, Q.C., Mr. *Rotch*, and Mr. *Charles Peile*, appeared for the North and South Wales Bank, which submitted without contest to any order that might be made. They did not, therefore, address the House.

Mr. *Kay* replied.

THE LORD CHANCELLOR (Lord Selborne): My Lords, the appellants, Duncan, Fox & Co., are liable, as indorsers of three bills of exchange, dated the 25th of November, 1875, drawn upon and accepted by a firm of Samuel Radford & Sons, for the total amount of £8,920 15s. 3d., and given to Duncan, Fox & Co., in part payment for wheat sold by them to Samuel Radford & Sons. The other appellants, Jonathan Robinson & Co., are liable as drawers and indorsers of two other bills, also drawn upon and accepted by Samuel Radford & Sons, under dates the *19th of No- [9 vember and the 14th of December, 1875, for the total amount of £5,432 7s. 6d., on account of other wheat sold to Samuel Radford & Sons. All these bills were discounted, in the usual course of business, with the North and South Wales Bank, without any special agreement; and the bank has never parted with and still holds them. Samuel Radford & Sons stopped payment in January, 1876, and on the 24th of February following executed a deed of inspectorship, under which their joint and separate estates are applicable for the benefit of their creditors, parties thereto, who are represented by the respondents. Neither the appellants nor the bankers are parties to that deed. The first of the five bills in question became due on the 22d of February, three others on the 28th of February, and the last on the 17th of March, 1876. They were all duly presented for payment, and dishonored, and notice was duly given of dishonor. Some payments have been made by the acceptors on account;

(¹) 2 Cox, 86.

(²) 3 Mer., 569.

and the amount now remaining due upon them is claimed by the bank, as to three from Duncan, Fox & Co., and, as to two, from the other appellants. The appellants are ready and willing to meet their liabilities on these bills, but they insist that a sum of £5,921 19s. 6d. now in the hands of the bank, which has been realized from securities held by the bank under a certain memorandum of deposit, dated the 1st of December, 1874, ought to be applied to relieve them as far as it will extend, and also that the securities yet remaining unrealized under the same memorandum (valued at about £2,000), ought to be handed over to them, on payment of the balance which, after the application of the £5,921 19s. 6d., will remain due upon the bills. This claim is resisted by the respondents, who, for this purpose, may be regarded as standing in the shoes of Samuel Collins Radford, one of the partners in the firm of Samuel Radford & Sons.

The deposit consisted of the title deeds of certain real estate at Liverpool, belonging absolutely to Samuel Collins Radford, which, by the memorandum of the 1st of December, 1874, were pledged to secure to the bank (whose customers Samuel Radford & Sons were), "the balance for the time being owing to the said bank by Samuel Radford & Sons for discounts and advances, and for all other moneys in or [10] for which the said firm, whether alone or *jointly with any other person or persons, were or might, from time to time thereafter be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm." At the time when the present question arose all dealings and accounts between the bank and Samuel Radford & Sons had been closed, and nothing remained due to the bank, under the memorandum of deposit, except the balance then unpaid upon those bills. The property from which the sum of £5,921 19s. 6d. was realized was sold by the bank after the commencement of the action. The bank is before the court (subject to its right to receive payment of the balance due on the bills and of its costs) merely as a stakeholder. In its answer it professes to be "desirous of acting with entire impartiality, and holding an even hand between the plaintiffs and the defendants, and of dealing with the securities and the proceeds thereof under the direction of the court;" and it offers, on receiving payment of what is due to it, to pay over any surplus, and to assign any property comprised in its security which may remain unsold, to such persons as the court may consider entitled.

The question, therefore, as to the proper appropriation of

the £5,921 19s. 6d. and the remaining securities, is between the respondents, claiming in right of Samuel Collins Radford (one of the acceptors), and the appellants, the indorsers of the bills of exchange; and it ought, I conceive, to be determined upon the same principles as if the appellants had actually paid the bills, and as if the bank had paid the proceeds of the securities either to the appellants, or into court in this action. If, in either of those events, Samuel Collins Radford would have been entitled to an order against the appellants for repayment, or for payment out of court of such proceeds, to be applied as part of his estate under the inspectorship deed, your Lordships' judgment ought now to be for the respondents: if not, the appellants are right. The Vice-Chancellor of the Palatine Court of Lancaster thought that the appellants were right; and, with the utmost respect to the Court of Appeal (which thought otherwise), I am of the same opinion.

In examining the principles and authorities applicable to this question, it seems to me to be important to distinguish between *three kinds of cases: (1.) Those in which [1] there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2.) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3.) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

It is, I conceive, to the first of these classes of cases, and to that class only, that the doctrines laid down in such authorities as *Owen v. Homan* (*), *Newton v. Chorlton* (*), and *Pearl v. Deacon* (*) apply in their full extent. If, so far as the creditor is concerned, there is no contract for suretyship, if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then I think that the creditor would not be subject to those special obligations which were described by Lord Truro in *Owen v. Homan* (*), and would not, generally, have his powers of dealing with securities circumscribed and restricted in the manner described by Vice-

(*) 3 Mac. & G., 378.

(*) 10 Hare, 646.

(*) 24 Beav., 186; 1 De G. & J., 461.

(*) 3 Mac. & G., pp. 396-7.

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Chancellor Wood in *Newton v. Chorlton* (¹), and by Lord Romilly and the Lords Justices in *Pearl v. Deacon* (²). If, for example, in *Pearl v. Deacon* (³) the contract of suretyship had been only between Pearl and Pearson *inter se*, Messrs. Deacon dealing with them both as principals, and not with Pearl as a surety, I should take it to be clear that Messrs. Deacon might have distrained upon goods comprised in their security for the rent due to them from Pearson, without losing (as they did in the actual case) their remedy against Pearl. The difficulties, therefore, which in the present case appear to have weighed most upon the minds of the judges in the Court of Appeal, would not ordinarily arise, unless there was a contract of suretyship properly so [2] called, not *between the two debtors only, but between them and the creditor also.

It is, however, consistent with this that the person who, as between himself and another debtor, is in fact a surety (though the creditor is no party to that contract of suretyship), has, against that other debtor, the rights of a surety; and that the creditor, receiving notice of his claim to those rights, will not be at liberty to do anything to their prejudice, or to refuse (when all his own just claims are satisfied) to give effect to them. The judgment of Lord Justice Turner, in *Davies v. Stainbank* (⁴) and the cases of *Ex parte Hoppins & Harrison* (⁵) and *Liquidators of Overend, Gurney & Co. v. Liquidators of Oriental Financial Corporation* (⁶) are founded, as I understand them, on this view of the law. In such cases the equity is direct in favor of the surety debtor against the principal debtor; but it affects the creditor towards whom they are both principals only as a man who has notice of the obligations of one of his own debtors towards the other. As between the two debtors, the "established principles of a court of equity," to which Sir Samuel Romilly referred in his argument in *Craythorne v. Swinburne* (⁷), judicially approved by Lord Eldon (⁸), are fully applicable. "Natural justice" (it was there argued) "requires that the surety shall not have the whole thrown upon him, by the choice of the creditor not to resort to remedies in his power." In *Aldrich v. Cooper* (⁹) Lord Eldon speaks of a surety's equity as resting upon the same principles with that of marshalling, when one creditor of the same debtor is able to resort to either of two funds, and another

(¹) 10 Hare, p. 651.(²) 24 Beav., 186; 1 De G. & J., 461.(³) 6 D., M. & G., 694.(⁴) 2 Glyn & Jameson, 93.(⁵) Law Rep., 7 H. L., 348; 3 Eng.

Rep., 1.

(⁶) 14 Ves., 162.(⁷) 14 Ves., at p. 165.(⁸) 8 Ves., 382, 389.

creditor to only one. "It is not," (he says) "by force of the contract, but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the court placing the surety exactly in the situation of the creditor." And soon afterwards (where he speaks of marshalling), "The principle, in some degree, is that it shall not depend upon the will of one creditor to disappoint another;" *and ('), "The court [13 has said that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor." And in *Younge v. Reynell* (') Vice-Chancellor Turner said: "When Lord Eldon says it is against conscience to sue the surety, it must be considered what is the meaning of that expression, and why this court considers it against conscience that the surety should be sued; and I take it to be because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is, I conceive, from this obligation that the right of the surety to the benefit of the securities held by the creditor is derived. The principle is not, I think, much dissimilar to that which applies where a man directs part of his estate to be employed in carrying on a trade, in which case the creditors of the trade have a right to resort to that part of the estate, because the trustees have a right to be indemnified out of it."

It appears to me that these principles of equity are not less applicable to cases of the third class,—cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to reimbursement or indemnity from the other,—than to those of the second class, in which there is a contract of suretyship to which the creditor is not a party. To this third class of cases, the rights of an indorser against an acceptor of a bill of exchange may most properly be referred. The liability of the indorser to the holder is, by the law-merchant, conditional, and (as was said by Mr. Justice Buller, in *Tindal v. Brown* (')) "only secondary;" but, when the conditions required by that law are fulfilled, it becomes absolute, and is that of a principal; and the indorser's right, if he pays the holder, to recover over

(') 8 Ves., p. 391.

(') 1 T. R., 170; affirmed 2 T. R., 186.

(') 9 Hare, 819.

against the acceptor is not founded on any agreement between him and the acceptor (who is as likely as not to be a stranger without any communication with him before the indorsement), but is established by the same law. But con-[14] tracts of this kind, as well as *surety ships proper, are entered into, by all the parties to them, with a knowledge and in view of the law by which they are governed. The acceptor, though he may know nothing of any particular indorser, knows that by his acceptance he does an act which will make him liable to indemnify any person who may indorse, and may afterwards pay the bills; and he knowingly and intentionally undertakes that liability, as much as if the indorsement were the result of direct communication between himself and that person. Lord Eldon, in *Ex parte Younge* (1), said with his usual accuracy (his language being as applicable to an indorser as to a drawer): "The drawer of a bill of exchange is not strictly a surety for the acceptor. In general cases, the acceptor is primarily liable upon the bill, and the drawer may be in the nature of a surety." The statement in Smith's Mercantile Law (3d edition, p. 253) is also correct, and is established by many authorities, that "in the contract by bill or note, the maker or acceptor is considered the principal, and the indorsers as his sureties; and consequently, if the holder either discharge or suspend his remedy against the former, the latter, unless they have previously consented to it, or afterwards promised to pay with knowledge of it, are all immediately discharged." Mr. Smith uses, in this passage, the language of Mr. Justice Chambre in *Clark v. Devlin* (2), who stated that the case of *Darley v. English* was decided by Lord Eldon (in the Common Pleas) on that principle. I am unable to conceive any ground on which the principle which prevails in cases of suretyship should go so far as this, in favor of the drawer or the indorser, and not also extend (when the indorser is compelled to pay the bill, and when the question arises between him and the acceptor only) to securities deposited by the acceptor with the holder. In the present case the holder has actually in his hands a large sum of money, realized by him from such securities. It is very difficult, on any rational principle, to distinguish the receipt of such a sum, under such circumstances, from an actual payment on account by the acceptor. Of the creditor's right, if he pleases, to apply it in payment of the bills there can be no possible question; yet it is contended that he may, at his option, give the money back to the acceptor,

(1) 3 V. & B., 40.

(2) 3 B. & P., 366.

and sue the indorser on the bills; nay more, that, if he *does compel the indorser to pay the bills, without [15 applying that money to them, a court of equity is bound to leave the burden on the indorser, and restore to an insolvent acceptor the money which has been so realized from the securities. I cannot reconcile such a decision with the doctrines of Lord Eldon and Lord Justice Turner. No case before the present has been cited, in which the right of a drawer or indorser to the benefit of such securities, as between himself and the acceptor, has ever been denied or doubted. The opinion of Sir John Byles, in his very learned Treatise on Bills, is (no doubt) no authority; and I will not lay stress upon the case of *Praed v. Gardiner* (¹), because, as was observed by Mr. Marten, what was really done in that case was to marshal securities held by the creditor according to the equities of the different persons entitled to redeem them, and the exact grounds of the judgment do not appear. But I think that the principles deducible from all the authorities lead, necessarily, to the conclusion, that, under circumstances like the present, the equity between the indorser and the acceptor is the same as that between a surety and a principal debtor when the creditor is not a party to the contract of suretyship. That equity, according to my view of it, need not interfere with the ordinary operation of such a general covering security as that given by Samuel Collins Radford to the North and South Wales Bank, during the continuance of the dealings between the secured creditor and the acceptor of bills not overdue, which the creditor may hold or part with as he pleases. It will not incapacitate bankers who may hold such a bill, accepted by a customer and indorsed by a third party, from carrying on their dealings with that customer, by varying the securities received from him according to the ordinary course of those dealings, as long as he remains solvent and before the acceptance has been dishonored. It will not, in my opinion, tend to paralyze the business of discounting bills of exchange. But it is an equity which, in my judgment, does certainly attach, when the bills, overdue and dishonored, and the securities, are found together in the hands of the secured creditor, at the time when he requires payment from the indorser; when the creditor has no other transactions then depending with the customer, and no *claim upon the securities except for the bills them- [16 selves; and when the competition is between the indorser and the acceptor only.

(¹) 2 Cox, 86.

For these reasons, I think that the judgment under appeal is erroneous, unless it can be supported on the ground that the security in this case was given by one only of the partners in the firm by which the bills were accepted. But it appears to me, that it can make no difference whether the security was given by all the acceptors or by one of them. In each case alike, the person giving the security, is principal debtor as between the indorser and himself; and the interest, whether of a sole debtor or of one of two or more joint debtors, is not (in my opinion) to be regarded in competition with the equity of any one who is in the nature of a surety for him, and whom he is bound to indemnify.

I therefore propose to your Lordships to reverse the decree appealed from, and to restore that of the Vice-Chancellor of the County Palatine of Lancaster. The bankers will take their costs here and below out of the fund arising from the securities; and the appellants must have their costs here and below out of any surplus remaining from the securities in the first instance, and (so far as the securities may not be sufficient to pay them) from the respondents.

LORD BLACKBURN: My Lords, the North and South Wales Bank had, amongst its customers, a firm of Samuel Radford & Sons. The bank had taken from Samuel Collins Radford, one of the partners in that firm, the title deeds of some property belonging to him with two memorandums, by which he acknowledged to have delivered the title deeds in pledge to secure to the bank whatever might be owing from the firm to the bank.

I do not think it either necessary or desirable to inquire what might have been the rights of the various parties under all the complicated state of things which might have arisen during the winding-up of the transactions between the bank and Samuel Radford & Sons. It is enough to consider the state of facts which has in this case actually occurred.

The bank had discounted for one of the appellants two [17] bills of *exchange, and for the other appellant three bills of exchange accepted by the firm of Samuel Radford & Sons, payable at a bank in London. These bills were indorsed by the appellants respectively. At maturity they were dishonored, and the firm was consequently liable to the bankers as holders of them, so that the equitable mortgage was held in pledge to the bank to cover, amongst other things, those bills. The bank gave due notice of dishonor to the several indorsers respectively, and they became bound to pay, to the bankers as holders, the amount of the bills, on having the bills delivered to them so as to remit them to

their former rights as holders against the acceptors and any indorsers prior to themselves.

The estate pledged to the bank has, in fact, been converted into money, and partly from that source, and partly from others, most of the liabilities of Samuel Radford & Sons to the bank have been discharged in full, and some payments have been made by the acceptors on account of the bills in question. And now it is ascertained that after all liabilities of the partners to the bank, except those on the five bills in question, have been discharged, there will remain on the equitable mortgage, partly realized, a considerable surplus, though not sufficient to pay the bills in full. The indorsers offer to pay the bills on having credit for the money realized, so far is not applicable to other purposes, and having the equitable mortgage transferred to them. Samuel Collins Radford has not become bankrupt, but the general creditors of the firm insist that the indorsers of the bills ought to be made to pay in full, and then that the surplus of the pledged estate should be delivered to Samuel C. Radford to be applied for the general benefit. The appellants have filed this bill to have the memorandums and the title deeds, together with the bills of exchange, delivered to them, on payment by them of what remains due to the bank on the bills. The bank is sure to be paid in full either way, and having no interest in the matter, does not wish to favor either party, and submits to deal with the bills of exchange and equitable mortgages, after satisfaction, of the principal moneys, interest, and costs, as the court may direct.

The Vice-Chancellor held that the appellants were entitled to *what they claim. The Lords Justices reversed his [18] decision, and the substantial question before the House is, whether the indorsers of the bills have such a right.

I think it is clear that they have no such right by contract. They did not at the time when they got the bills discounted at the bankers so much as know that the bank held any security from Samuel Radford & Sons, and of course, that being the case, made no express stipulation about it; and there is nothing in the nature of an indorsement for value to give the indorser any right, during the currency of the bill, to any security which either his immediate indorsee, or any other holder of the bill, may have from any party to the bill. The indorser, by the law-merchant, is liable, on having due notice of dishonor, to pay the amount of the bill to the holder for the time being, on having the bill restored to him; but till the bill is dishonored

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there is nothing to prevent the party who may be the holder for the time being indorsing it, even without recourse, so as to make it impossible that he can ever be the person to whom the prior indorser will have to pay the bill. I think, therefore, with the Lords Justices, that there is neither principle nor authority for saying that the indorsers are, during the currency of the bill, sureties, or in the nature of sureties to the indorsee, or that they have any equity to prevent the indorsee from dealing as it may seem to him most desirable, with any other parties unless thereby he prevents himself from giving notice of dishonor, so as to give them their remedy against prior parties to the bill; and I agree with them in thinking that any contrary decision would be very mischievous.

But though the indorsers had no such right by contract, yet after the bills were dishonored and notice of dishonor had been given to the indorsers, the position of the parties is altered. Though the indorser is liable as principal on the bill, and is not strictly a surety for the acceptor, he has this in common with a surety for the acceptor, that he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor. And now the state of affairs is so far cleared up, that the bank had, [19] besides the right to come upon the indorsers, a *right to come upon the security pledged to the bank by Samuel Collins Radford.

I think it is established by the case of *Deering v. Lord Winchelsea* ⁽¹⁾, and the observations on that case by Lord Eldon in *Craythorne v. Swinburne* ⁽²⁾, and Lord Redesdale in *Stirling v. Forrester* ⁽³⁾, that where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion. This is quite independent of any contract between the parties thus liable. Lord Eldon in *Craythorne v. Swinburne* ⁽²⁾, says of *Deering v. Lord Winchelsea*: "That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction." And Lord Redesdale, in *Stirling v. Forrester* ⁽³⁾, says: "The principle established in the case of *Deering v. Lord Winchelsea* ⁽¹⁾ is universal, that the right and duty of contribution is founded upon doctrines of equity, it does not depend upon contract.

⁽¹⁾ 2 B. & P., 270.

⁽²⁾ 14 Ves., 165.

⁽³⁾ 3 Bli., 575.

⁽⁴⁾ 3 Bli., at p. 590.

If several persons are indebted, and one makes the payment, the creditor is bound in conscience (if not by contract) to give to the party paying the debt all his remedies against the other debtors. . . He (the creditor) is bound, seldom by contract but always in conscience, as far as he is able, to put the party paying the debt upon the same footing as with those who are equally bound. That was the principle of decision in *Deering v. Lord Winchelsea* (¹), and in that case there was no evidence of contract." And this last principle, that the person making payment of more than his due proportion is entitled to have assigned to him all rights and securities of the creditor for the purpose of, by means thereof, obtaining contributions, is recognized and enacted by the 19 & 20 Vict. c. 97, s. 5.

I think that though the indorser of a bill is not exactly a surety for the acceptor, or a co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to bring him within the principle of *Deering v. Lord Winchelsea*. (¹)

*If this be correct, it seems to me that the question [20 in the present case is reduced to this: what are the due proportions as between the indorsers and the security created by one of the acceptors on his separate estate? If a third person, not a member of the firm or liable for its engagements, had become surety or pledged his estate as security to the bank for the general balance due to it from the firm, it might be contended, at least plausibly, that he became only surety for the balance after all indorsers had paid, and was therefore entitled to say that, as between him and the indorser, the indorser should pay all before the surety paid anything. I do not express any opinion how that would be. But the owner of the pledged estate in this case was himself one of the firm and an acceptor of the bill, and as such liable to the indorser. . And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that Samuel Collins Radford could not have come on the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole. And it follows, that if the bank comes upon the indorsers first, they must have the right to be recouped out of the security, unless the bank had an option to favor whichever set of those liable it pleased, which the reasoning

(¹) 2 B. & P., 270.

of Lord Eldon seems to me to treat as manifestly inconsistent with the doctrine of equity.

I have, therefore, come to the conclusion that the decision below ought to be reversed.

I have not done so without some hesitation. For it is not to be denied that the result is that the indorsers of bills who happen to have discounted them with other banks are worse off than the appellants, who, by what as regards them is a lucky chance, have got the benefit of this security. I am afraid to question the justice of a rule approved by such great lawyers as Lords Eldon and Redesdale, though Lord Eldon does not seem at first to have approved of *Deering v. Lord Winchelsea* (¹); but if it were *res integra* I am by no means sure that it would not have been better to say that every one should have the full extent of his rights given by 21] *contract, express or implied, and no more. But I think the unbroken current of authority from *Deering v. Lord Winchelsea* (¹), decided in 1787, very nearly a century since, renders it impossible now to indulge in such speculations.

I agree to the order as to costs which has been proposed by the noble and learned Lord on the woolsack.

LORD WATSON: My Lords, I shall endeavor very briefly to indicate the grounds upon which I agree with your Lordships in holding that the judgment of the Lords Justices ought to be reversed, and that of the Vice-Chancellor restored. I should have had difficulty in coming to that conclusion had it had not been that in the present case there are certain special circumstances, and that there are authorities in the law of England applicable to these circumstances, which do not seem to have been taken into consideration by the Court of Appeal.

It does not appear to me that the broad proposition maintained by the appellants at the bar of the House and elsewhere, to the effect that the indorser of a bill of exchange becomes entitled, in a question with the holder, to the same equities as if he had been a proper surety for the acceptor, has any foundation in law. To give these equities to an indorser before the bill falls due would, in my opinion, be inconsistent with the nature of a bill of exchange, and the rights and obligations which it creates in favor of and against the parties to it; and I entirely agree with the observations of the Master of the Rolls upon the grave inconveniences to which bankers and merchants would be exposed by the introduction of such a principle, so far as

(¹) 2 B. & P., 270.

these observations apply to the period of the bill's currency.

The special circumstances which appear to me to be of vital importance to the decision of the present case are these: that at the time when the bills in question matured, the bankers had brought their dealings with the acceptors to a close, in consequence, apparently, of the insolvency of the latter, and that the bank then held securities sufficient, when realized, not only to pay off all other debts due by [22 the acceptors, but also to cover, if not in whole, at least in great part, the liabilities of the acceptors upon these bills.

That the bankers had power, in terms of the memoranda of deposit by Samuel Collins Radford, to apply the balance of their securities in extinction of the indebtedness of the firm of Samuel Radford & Sons upon the bills in question, does not admit of doubt. Accordingly, the bank had a legal right to recover from the indorser, who became directly liable to them upon the failure of the acceptors to honor the bills, and had also a legal right under their arrangement with Samuel Collins Radford, a partner of the acceptors' firm, to obtain payment out of the free balance of the securities deposited by him. In a question with the bank the acceptors and the indorsers were alike principal debtors, but the bankers knew, at least it came to their knowledge before they had exacted payment from either, that in a question with the indorsers the acceptors were, in reality, as well as *ex facie* of the bills, primarily liable. In these circumstances it is obviously immaterial to the bankers from which source they obtain payment of their debt.

In the present case Samuel Collins Radford cannot, in my opinion, plead that he did not intend to become liable for the dishonored acceptances of his firm, discounted with the North and South Wales Bank, and seeing that the real conflict of interests lies between him and the indorsers, I think it would be inequitable to compel payment from the indorsers until the securities given by him to the bank have been exhausted.

But, my Lords, I conceive that there is abundant authority in the law of England conclusive in favor of the indorsers' claim. I shall not refer in detail to the series of decisions which have been fully dealt with by your Lordships. They satisfy me that it has long been a settled rule of equity that, in circumstances analogous to those of the present case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

I have only to add that, whilst it is my opinion that the indorser is not in the likeness, and therefore cannot claim [23] the equities of a *surety, so long as the bill is current, I am not prepared to hold that he becomes necessarily, and in all circumstances, entitled to these equities whenever the bill matures. It is possible that, after maturity, the holder of the bill may have such interest, arising from his relations with the acceptor, as will entitle him even then to deal with his securities without respect to the interests of the indorser. But the solution of these questions is unnecessary for the disposal of the present case.

Order appealed from reversed; decree of the Vice-Chancellor of the County Palatine of Lancaster restored, with directions as to costs, and cause remitted.

Lords' Journals, 27th Nov., 1880.

Solicitors for appellants: *G. L. P. Eyre & Co.*

Solicitors for respondents: *Gregory, Rowcliffes & Rawle.*

See 29 Eng. R., 224 note.

Bail are sureties, with the rights and remedies of sureties in other cases: *Toles v. Adee*, 84 N. Y., 224.

H. & M. were carrying on business in copartnership, and H. becoming dissatisfied with the manner in which the business was conducted, a dissolution was agreed upon, in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it, H. retiring and assigning to M. his interest in the partnership assets, in consideration of \$1,332, for which M. gave his promissory notes at three, six, nine and twelve months, and bound himself to pay all the debts of the copartnership. M. continued to carry on the business, and in doing so had several transactions with the plaintiffs, from whom he continued to receive goods on credit, giving promissory notes for the price as well as to cover the firm's indebtedness, during which time the plaintiffs rendered periodical statements to M.—ignoring, apparently, the existence of H.—in which the liabilities of the firm and M. were embraced, although expressed “M. and H. Liability,” giving the items, and “J. M. Liability,” also detailing the items. M. by means of contra accounts against H. had reduced the latter's claim to about \$400. In

November or December, 1876, the plaintiffs applied to H. to renew the partnership notes, but this he declined to do on the ground that he was not liable, notwithstanding which the plaintiffs continued to deal with M. until he became insolvent in January, 1880, when they instituted proceedings against both partners to recover their claim.

Held, reversing the finding of Cameron, J., that the effect of the dealings between H. and M. was not to constitute H. a surety for M., and that he, M., remained liable to the plaintiffs for the partnership debts: *Birkett v. M'Guire*, 7 Upper Can. App. Rep., 53.

A creditor has a right to assume that the parties to a negotiable instrument are liable in the form in which they contract, unless he has notice to the contrary. In order to derive any advantage from the fact that he was a surety, the surety must prove the creditor had knowledge of the suretyship.

Indiana: *Tharp v. Parker*, 86 Ind., 102; *Williams v. Scott*, 83 Ind., 405.

Maine: *First National v. Marshall*, 73 Maine, 79.

New York: *Irving, ect., v. Duryea*, 1 City Cts. Rep., 317.

North Carolina: *Goodman v. Lita-ker*, 84 N. C., 8.

Oral evidence is admissible to show

one, apparently a principal debtor, is in fact a surety.

United States, Circuit and District: Matter of Goodwin, 5 Dillon, 140, 143, 144 note.

Though the holder take an accommodation note without notice of that, yet subsequent notice thereof is sufficient to bind him to treat the maker as a surety: Matter of Goodwin, 5 Dillon, 140, 144 note.

If a creditor, without the assent of a surety, enter into a valid contract for delay in the collection and enforcement of his debt, or adopt any other course which operates as a suspension of the right to enforce it, the surety will be thereby discharged.

Illinois: First National, etc., v. Pierce, 99 Ills., 272.

Indiana: Williams v. Scott, 83 Indiana, 405.

Iowa: Wendling v. Taylor, 57 Iowa, 354.

Kentucky: Calloway v. Snapp, 78 Ky., 561.

New York: Fish v. Hayward, 28 Hun, 456.

North Carolina: Carter v. Duncan, 84 N. C., 676.

Ohio: Boling v. Young, 38 Ohio St. R., 135.

Texas: Saylor v. Scott, 57 Tex., 367.

United States, Circuit and District: Matter of Goodwin, 5 Dillon, 140, 144 note.

An agreement for a year's extension, or payment of interest in advance, discharges a surety: Williams v. Scott, 83 Ind., 405.

If the contract be executory on both sides, a binding agreement extending the term of performance is a material change. Such an agreement, where the contract contemplates mutual acts to be performed by both parties, such as a tender of specific articles by the one, and acceptance or rejection by the other, is supported by a sufficient consideration, each party being both promisor and promisee: Saylor v. Scott, 57 Tex., 367.

If, after judgment against principal and sureties, an extension of the issuing of an execution be made on the execution of an agreement by a surety, the sureties in the judgment are discharged: Boling v. Young, 38 Ohio St. R., 136.

One who has loaned his note to an-

other for the latter's accommodation, and subsequently, when his note becomes due, receives the note of a third person for a portion and cash for the balance of the amount due on his own note, and thereupon pays his own note, is a holder for value of the note of such third person.

By receiving such new note he has extended, by the time which it has to run, the time for the payment of his debt, and such extension of payment is a valuable consideration for the transfer of such new note to him: Callahan v. Bancroft, 28 Hun, 584.

The written consent of appellee, Mrs. Snapp, on the 12th of June, 1873, that Hopkins, the principal on the note, should be discharged in bankruptcy without paying the amount required by the bankrupt act, although withdrawn, on her motion, eight months afterwards, by order of the court having cognizance of the case, operated to discharge appellant, who was Hopkins' surety upon the note sued upon: Calloway v. Snapp, 78 Ky., 561.

Where the principal to an undertaking confessed judgment on the creditor agreeing to stay execution for thirty days, without the knowledge or consent of a surety to the undertaking, held that giving stay of execution on the judgment, without consent of the surety, discharged him: Kendall v. Grice, 1 Mackey, 279.

Oldfield purchased from one Hayward certain real estate, subject to a mortgage given by Hayward to the Globe Life Insurance Company, which Oldfield assumed and agreed to pay. Thereafter Oldfield entered into a verbal agreement with a clerk of the said company who acted in its behalf, by which Oldfield took a ten year tontine policy upon his life, and in consideration thereof the company extended the time for the payment of the mortgage for that period. After six premiums had been paid upon the policy it was allowed to lapse.

Held, that the verbal agreement for the extension of the time of payment of the mortgage was founded upon a valuable consideration; that, as it was completed when the policy was issued and the first premium paid, it did not come within the statute of frauds.

That as it was made without the knowledge or consent of Hayward,

he was released by it from all liability for any deficiency that might arise upon the sale: *Fish v. Hayward*, 28 Hun, 456.

Where A. and B. become sureties for the faithful performance by C. of a contract with D., by which C. was to receive a salary, and the expenses of the business were to be borne by D.: Held, that the sureties were discharged by a subsequent alteration of the contract, so C. was to pay the expenses and sell on commission: *Victor, etc., v. Langham*, 9 Bissell, 183.

If the holder of a promissory note enters into an agreement, not under seal, with the maker, by which the time of payment is to be extended, the interest then due is to be paid at the original rate, and the holder is afterwards to apply a portion of the interest towards the extinguishment of the principal, the agreement is without consideration and not binding upon the holder, and does not operate to discharge a surety on the note: *Wilson v. Powers*, 130 Mass., 127.

An agreement, not under seal, to discharge an indebtedness, is not a release and cannot have that effect.

A discharge given by the holder of a promissory note to one who signed upon the back does not discharge one who signed upon the face of the note, when there is no evidence that the holder had any other knowledge of the relation between the signers than that obtained from an examination of the note. How far parol evidence is admissible to show a relationship between the parties, the reverse of that shown by the note, is not decided.

Where an agreement to discharge one party to a note in express terms reserves all claims against all other parties to the note, it will not discharge any other party: *Bank v. Marshall*, 73 Me., 79.

By contract between G. and plaintiff, G. was to have the *exclusive* right in certain places to sell harrows bought by him of plaintiff, and was to pay plaintiff for harrows so purchased either "by cash or note due July 1, 1879, with privilege of five months extension, if desired, with ten per cent. interest." B. guaranteed payment by G. for all purchases made by him under such contract, and payment of all

notes "or renewals thereof," made by G. in pursuance of the contract. Afterwards, by a written addition to the contract with G., made without the knowledge of B., plaintiff gave him the privilege of selling harrows at a certain other place named. G. sold harrows at such other place, and gave his note for the amount due plaintiff therefor, payable *on or before* November 1, 1879, with interest after July 1, 1879, at ten per cent. In suit on such note, held:

1. That the liability of B. as surety was not affected by the additional agreement between G. and plaintiff as to the *place* of sale.

2. That there is no *material* difference between the form of the note in suit given by G., and that described in the contract; and the surety is liable thereon: *The Fond du Lac Harrow Co. v. Bowles*, 54 Wisc., 425.

The testator provided in his will that if his executors should decide to collect from his surviving partners in business, such sum as was due his estate, the amount should not be paid until a certain time had elapsed. The surviving partners, in a suit by the executors, gave bond conditioned to pay "all sums of money that are now due or may hereafter become due." The executors subsequently took the notes of the surviving partners, payable at a future time within that provided in the will: Held, that taking of the notes was not such action by the executors as released the sureties of the bond: *Nash v. Heilman*, 9 Bissell, 358.

A mere agreement for extension for a year, at legal interest, is *nudum pactum*, and does not discharge a surety: *Rumberger v. Golden*, 99 Penn. St., 34.

An extension of time given without consideration, or on payment of part of the amount due, does not discharge a surety.

Kansas: So a further agreement or consideration by an agent without authority: *Prather v. Gammus*, 25 Kans., 379.

Any agreement which does not suspend the creditor's remedy against the principal, i.e., an agreement to accept less than sum due without an extension, does not discharge a surety.

Maine: *Miller v. Hatch*, 72 Me., 481.

Tennessee: *Cherry v. Miller*, 7 Lea, 305.

In order that an agreement between a creditor and principal debtor extending the time of payment shall have the effect of discharging the surety, the extension must be for a definite period. It makes no difference how short the time; it must be fixed: *King v. Haynes*, 35 Ark., 463; *Cherry v. Miller*, 7 Lea (Tenn.), 305.

A., a banking house, held a note indorsed by B., upon which it had obtained judgment against the maker, C. A. agreed with C. to extend the time of payment of said note if C. would pay ten per cent. interest thereon and continue his banking business with A. In a suit on the note by A. against B., held that this extension of the time of payment was indefinite and did not discharge B.: *People's Bank v. Le Grand*, 13 W. N., Penn., 817.

An agreement to extend the time of payment of a debt, if made in consideration of the payment of a usurious bonus is void, and does not operate to discharge the debtor's sureties: *Derrick v. Hubbard*, 27 Hun, 347; *May v. Shepherd*, 1 Mackey, 480.

In *Indiana* it has been held that an agreement for extension, though valid, is not available to the principal, by any form of pleading, in a suit on the note brought before the time given has elapsed; his only remedy being by suit for damages for breach of the agreement to provide: *Williams v. Scott*, 88 Ind., 405, 411.

Where surety claims discharge by reason of extension of another paper, parol evidence of the contents of that is inadmissible: *Swift v. Ratliff*, 74 Ind., 426.

On a trial of an action on a note against principal and surety, wherein the surety has set up an extension of time, a question to the payee, a witness, asking his reason for not giving an extension, and his answer thereto that he knew of the principal's insolvency, were relevant, competent and material: *Thompson v. Boden*, 81 Ind., 176.

The neglect of a creditor, upon request of a surety, to proceed against the principal, discharges the surety, if thereby the debt has been lost: *Toles v. Adee*, 84 N. Y., 224.

An accommodation indorser is not a surety in such a sense as to enable him to discharge himself from liability on a

note, by proving a request to the holder of the note to enforce payment by the maker, the neglect of the holder to do so, the solvency of the maker at the time when such request was made, and his subsequent insolvency: *Converse v. Cook*, 25 Hun, 44.

The liability of a surety, upon a promissory note, is not lessened or terminated by the neglect of the holder to sue the maker upon the request of the surety, where it appears that the maker was, at the time of such request, and at all times thereafter, insolvent: *Marsh v. Duncel*, 25 Hun, 167.

The term insolvent means one whose estate is not sufficient to pay his debts, or one who is unable to pay all his debts from his own means: *Marsh v. Duncel*, 25 Hun, 167.

Where a surety claims a discharge from a failure of the creditor to sue the principal debtor after notice to him to sue, and the subsequent insolvency of the debtor, the surety must show clearly the nature and terms of the notice: *King v. Haynes*, 35 Ark., 463.

In order that the failure of a creditor to enforce the payment of a debt, when requested by one who is liable as a surety therefor, shall operate to discharge the latter, the notice given to the creditor must be clear and explicit, and he must be given to understand that he must take proceedings in the courts to collect the debt: *Derrick v. Hubbard*, 27 Hun, 348.

Where, upon the sale of a bond and mortgage, the assignee has guaranteed the payment, he is not released from liability on his guaranty by a failure on the part of the assignee to comply with a notice requiring him to proceed to collect the indebtedness by legal proceedings, although the property has, after the notice, depreciated in value, and the obligor has become insolvent. It is the duty of the guarantor in such case to pay the debt when it matures, and he can then protect himself by enforcing the principal obligation; he cannot by notice impose upon the creditor the duty of active diligence: *Newcomb v. Hale*, 90 N. Y., 326.

See also *Mead v. Parker*, 29 Hun, 62.

Where the debtor transfers collaterals to the creditor, the latter is bound to proper diligence in realizing thereon, and, if in consequence of his negligence

there is nothing to prevent the party who may be the holder for the time being indorsing it, even without recourse, so as to make it impossible that he can ever be the person to whom the prior indorser will have to pay the bill. I think, therefore, with the Lords Justices, that there is neither principle nor authority for saying that the indorsers are, during the currency of the bill, sureties, or in the nature of sureties to the indorsee, or that they have any equity to prevent the indorsee from dealing as it may seem to him most desirable, with any other parties unless thereby he prevents himself from giving notice of dishonor, so as to give them their remedy against prior parties to the bill; and I agree with them in thinking that any contrary decision would be very mischievous.

But though the indorsers had no such right by contract, yet after the bills were dishonored and notice of dishonor had been given to the indorsers, the position of the parties is altered. Though the indorser is liable as principal on the bill, and is not strictly a surety for the acceptor, he has this in common with a surety for the acceptor, that he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor. And now the state of affairs is so far cleared up, that the bank had, [9] besides the right to come upon the indorsers, a *right to come upon the security pledged to the bank by Samuel Collins Radford.

I think it is established by the case of *Deering v. Lord Winchelsea* ⁽¹⁾, and the observations on that case by Lord Eldon in *Craythorne v. Swinburne* ⁽²⁾, and Lord Redesdale in *Stirling v. Forrester* ⁽³⁾, that where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion. This is quite independent of any contract between the parties thus liable. Lord Eldon in *Craythorne v. Swinburne* ⁽²⁾, says of *Deering v. Lord Winchelsea*: "That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction." And Lord Redesdale, in *Stirling v. Forrester* ⁽³⁾, says: "The principle established in the case of *Deering v. Lord Winchelsea* ⁽¹⁾ is universal, that the right and duty of contribution is founded upon doctrines of equity, it does not depend upon contract.

⁽¹⁾ 2 B. & P., 270.

⁽²⁾ 14 Ves., 165.

⁽³⁾ 3 Bli., 575.

⁽⁴⁾ 3 Bli., at p. 590.

If several persons are indebted, and one makes the payment, the creditor is bound in conscience (if not by contract) to give to the party paying the debt all his remedies against the other debtors. . . . He (the creditor) is bound, seldom by contract but always in conscience, as far as he is able, to put the party paying the debt upon the same footing as with those who are equally bound. That was the principle of decision in *Deering v. Lord Winchelsea* (¹), and in that case there was no evidence of contract." And this last principle, that the person making payment of more than his due proportion is entitled to have assigned to him all rights and securities of the creditor for the purpose of, by means thereof, obtaining contributions, is recognized and enacted by the 19 & 20 Vict. c. 97, s. 5.

I think that though the indorser of a bill is not exactly a surety for the acceptor, or a co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to bring him within the principle of *Deering v. Lord Winchelsea*. (¹)

*If this be correct, it seems to me that the question [20 in the present case is reduced to this: what are the due proportions as between the indorsers and the security created by one of the acceptors on his separate estate? If a third person, not a member of the firm or liable for its engagements, had become surety or pledged his estate as security to the bank for the general balance due to it from the firm, it might be contended, at least plausibly, that he became only surety for the balance after all indorsers had paid, and was therefore entitled to say that, as between him and the indorser, the indorser should pay all before the surety paid anything. I do not express any opinion how that would be. But the owner of the pledged estate in this case was himself one of the firm and an acceptor of the bill, and as such liable to the indorser. . And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that Samuel Collins Radford could not have come on the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole. And it follows, that if the bank comes upon the indorsers first, they must have the right to be recouped out of the security, unless the bank had an option to favor whichever set of those liable it pleased, which the reasoning

(¹) 2 B. & P., 270.

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Fisher v. Stockbrand, 26 Kans., 565, 570-4, distinguishing *Clark v. Sickler*, 64 N. Y., 231, on the ground that no tender was there made; that the creditor did not refuse to receive payment, but only expressed a desire that it should not be paid.

In an action upon a promissory note, against the principals and the surety, the evidence showed that in the presence of one of the makers of the note and of the payee, the surety gave notice that he would not remain longer as surety thereon; that the maker then said to the payee, "If you will let our firm have the money on our own note we will take it; otherwise we will pay you off." To which the payee replied: "I don't want the money. I will take Taylor's" (the surety) "name off the note. I will bring down the note and fix the matter up, and either get new notes or take the money." But no new note was executed, and for several years thereafter the makers paid interest on the note, of which facts the surety was ignorant, and after their insolvency this suit was instituted.

Held, that the transaction amounted to a payment of the note and a reloan of the money to the makers, and that the surety was thereby discharged from any liability thereon.

Held, also, that keeping a surety so long in ignorance that the note had not been paid or exchanged for the note of the principals, had all the effect of a fraudulent concealment of the facts, whether so intended or not: *Taylor v. Lohman*, 74 Ind., 418.

To a complaint on a promissory note, an answer by the surety that after the note matured the principal tendered to the payee the amount due in goods, which the surety offered at the same time to take and pay for, which offer the payee refused and suffered the principal to become insolvent, is bad. So, also, is an answer alleging, in addition, that the surety counted out and offered to the plaintiff the full amount of the note and interest, and the latter refused to accept the money: *Wilson v. McVey*, 83 Ind., 108.

J. P. as principal, and G. P. as surety, owed appellee, Henshaw, a note of \$1,000. J. P. delivered to his surety G. P. the money, which he promised to pay to the obligee.

The principal afterwards sued his

surety, and recovered a judgment against him for the money so delivered:

Held, that the obligee has no lien upon the fund, there being no privity between him and either of the obligors as to the money delivered.

The principal had the right to countermand the appropriation and recall the money before it came to the obligee's hands: *Spalding, etc., v. Henshaw*, 80 Ky., 55.

Where a creditor has the means of satisfaction from the property of the principal in his power, and fails to avail himself of them, the surety will be discharged: *Clow v. Derby Coal Co.*, 98 Penn. St. R., 432.

It is the duty of the payee of a note, upon which there is a surety, to hold all securities he has from the principal of the note for the benefit of the surety; and if he releases a lien upon property of greater value than the amount of the note, such release discharges the surety, though the principal be a married woman and not bound by the note: *Sample v. Cochran*, 82 Ind., 260.

Where, under a judgment upon a promissory note against the makers, an execution has been levied upon their property, the release of such levy operates to release the indorsers if such levy was sufficient to satisfy the judgment; or, if not sufficient, the indorsers are released to the extent of the value of the property levied upon. But in a suit against the indorsers, they cannot show such defence without pleading it: *Pease v. Tilt*, 9 Daly, 229; *Priest v. Watson*, 75 Mo., 310.

A surety upon a promissory note will be discharged from liability thereon by a surrender of the note, though such surrender is procured by the fraud of the principal when he is ignorant of the fraud, and to his prejudice relies on the surrender: *Kirby v. Landis*, 54 Iowa, 150.

A contract entered into between a creditor and principal debtor to release the debtor "from all the indebtedness he holds against him individually, but not the securities which the debtor has given him upon notes in any other manner," does not operate as a discharge of the surety: *Stirewalt v. Martin*, 84 N. C., 4.

The mere delay of a creditor to call an assignee to account until after he has become insolvent, will not relieve

the sureties upon his bond from liability: *People v. White*, 28 Hun, 289; *Cassidy v. Schedel*, 9 id., 840.

Where a creditor suffers a judgment obtained on a bond to lose its lien by reason of a defective revival which did not give notice to the terretenant, and afterwards sues the surety on the same bond, the latter cannot avail himself of the negligence of the plaintiff as a defence: *Kendt's Appeal*, 13 W. N. (Penn.), 187, following *Winston v. Little*, 94 Penn. St. R., 64.

Mere forbearance, however prejudicial to a surety, will not discharge him. The failure of a creditor to revive a judgment does not discharge his surety, unless there was an express agreement at the time of giving the judgment that it should be kept revived for the benefit of the surety: *Winston v. Little*, 94 Penn. St. R., 64; *U. S. v. Simpson*, 3 Penr. & Watts, 437; *Cherry v. Miller*, 7 Lea (Tenn.), 305.

The holder of a promissory note, the principal maker of which is deceased, is not bound to inform a surety that the note is unpaid before the settlement of the principal's estate, nor to prove the same against the estate: *Jackson v. Benson*, 54 Iowa, 654.

Where the holder of negotiable paper who has a lien upon personal property for security, but is charged with no responsibility for its custody or care, fails to enforce his lien, and the security is lost, such failure cannot be set up as a matter of defence by a surety or guarantor: *Fuller v. Tomlinson*, 58 Iowa, 111.

Where there was judgment against a principal and surety, and execution had been levied on exempt property of the principal to which levy the principal objected, and the judgment creditor thereupon ordered the property released and the levy discharged, *semble*, that such act of the judgment creditor did not discharge the surety: *Green v. Blunt*, 59 Iowa, 79.

A guaranty indorsed upon a note is an absolute contract for the payment of the note at maturity, upon default of the maker; and the guarantor will be liable thereon, although the note was secured by a lien upon personal property, and the guarantee failed to enforce such lien until the security became lost and the maker of the note

insolvent: *Harvester Co. v. Tomlinson*, 58 Iowa, 129.

As to the right of a bank to apply money on deposit to any debt, and that a surety on another has no defence by reason of such application, see 81 Eng. R., 195.

Subsequent to an entry of judgment against the maker of a note, in pursuance of an agreement that such maker should do his banking business with the judgment creditor, the maker had sufficient sums of money on deposit with the creditor to pay the note on which judgment had been recovered. Held, that the creditor was not bound to apply said sums in payment of such note, and his omission to do so did not discharge a surety thereon.

It seems that if the creditor had had the principal debtor's money on deposit at the time of bringing suit against the surety, he could have availed himself of the principal debtor's right of set-off: *People's Bank v. LeGrand*, 13 W. N. (Penn.), 817, following *Martin v. Mechanics' Bank*, 6 Harr. & Johns., 235, *Voss v. German*, etc., 83 Ills., 599, and *National Bank v. Smith*, 66 N. Y., 271, and disapproving *McDowell v. Bank*, 1 Harrington, 869.

A release by a mortgagee with notice of subsequent incumbrances also releases the premises from the lien of intermediate incumbrancers: 36 N. J. Eq. Rep., 26 note, and numerous cases cited.

Where a purchaser of part of mortgaged premises assumes to pay the mortgage as part of the purchase-money, the portion so purchased becomes, in equity, the primary fund for such payment: *Bowen v. Lynde*, 91 N. Y., 92, 16 N. Y. Weekly Dig., 248.

And if the time of payment by the grantee be legally extended by the creditor with notice, the mortgagor is discharged: *Star*, etc., v. *Waddington*, 18 N. Y. Weekly Dig., 807.

A release of a part of mortgaged premises, given with knowledge of a prior conveyance of another part, is not a technical discharge of the part conveyed, nor does it amount to an equitable release or discharge, unless upon the principles of natural equity and justice it ought thus to operate against the mortgagee giving the release: *Kendall v. Woodruff*, 87 N. Y., 1, affirming 46 N. Y. Superior Ct. R.,

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544, affirming 45 id., 542, 58 How. Pr., 156.

Notice to a purchaser of lands of the mere existence of a judgment which is a lien upon the lands, is not sufficient to affect the purchaser with any equity existing between the parties to the judgment, such as a right to have the judgment collected out of a particular tract of land. The plaintiff in a judgment and his assignees have, as a part of the contract, a right to all the remedies appropriate for its collection, including the election to enforce it against any real estate of the defendant who cannot afterwards abridge this right by selling a part of his real estate, or by any special arrangement with the purchaser for the payment of the judgment out of the land sold, without the creditor's permission.

The creditor may be compelled in equity to enforce his lien first against as much of the debtor's real estate as remains unsold, but this is only at the instance, and for the benefit of a third party, the purchaser: *Wilson v. Wilson*, 8 Del. Ch., 183.

The release by the owner of a mortgage, the payment of which is guaranteed, of a small portion of the land covered by the mortgage, without the knowledge or consent of the guarantor, when the fair value of the land so released is received for it and is applied upon the mortgage, does not relieve the guarantor of his liability, in the absence of proof that the value of the residue was diminished by the release of the parcel: *Tooker v. Winston*, 17 N. Y. Weekly Dig. 302, 30 Hun, 83, mem.

A blank indorsement of a promissory note by the payee imports an obligation to pay on due notice of demand and failure to pay by the maker, and the effect of this contract cannot be varied or changed in a suit between the indorser and indorsee by parol evidence to contradict or repel such liability: 29 Eng. Rep., 569 note; 30 id., 669 note.

New York: Grocers' Bank v. Murphy, 9 Daly, 510; *Cramer v. Lovejoy*, 17 N. Y. Weekly Dig., 381, mem. 30 Hun, 309.

Ohio: Cummings v. Kent, 12 Amer. Law Rec., 163.

Pennsylvania: Rogers v. Donovan, 18 Phila., 51.

United States, Supreme Court: Martin v. Cole, 104 U. S., 30.

The fact that one writes his name on the back of a bill of exchange and hands it to another, does not necessarily constitute the former an indorser: *Westlacott v. Smalley*, 1 Cababe & Ellis, 124.

In an action upon a promissory note, proof may be given on the part of defendant of a prior agreement between the maker and the payee, providing for a mode in which the debt should be satisfied without the payment of money. Such proof does not conflict with or contradict the notes, and the performance of such agreement by defendant constitutes a defence to the action: *Nichol v. Nelson*, 18 N. Y. Weekly Dig., 210; *Batterman v. Pierce*, 8 Hill, 171, 178; *Grierson v. Mason*, 1 Hun, 118, 60 N. Y., 394.

The rule excluding evidence of parol negotiations and undertakings, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties thereto, from proving, by way of defence, the existence of an oral agreement made in connection with the written instrument, where the circumstances would make the use of the latter, for any purposes inconsistent with the oral agreement, dishonest or fraudulent.

As also the consideration of an agreement is open to inquiry, a party may show that the design and object of the written agreement were different from what its language, if alone considered, would indicate.

He may also show that the written instrument was executed in part performance only of an entire oral agreement, or that the obligation of the instrument has been discharged of a parol agreement collateral thereto.

In an action to recover a sum of money alleged to have been loaned by H. L. & Co. to defendant, a plaintiff put in evidence a written instrument executed by defendant, which stated that he had "borrowed and received" of S. M. & Co. the sum claimed, and that the same was "payable to them or order on demand, with interest." Defendant offered and was permitted to prove, as a defence, that the instrument was executed as a part of a prior oral

agreement, by the terms of which the payees were to advance the money in anticipation upon debts owing by them, and on the defendant's promise that it should be applied in discharge of those debts, and that the writing should be executed, but when the money was so applied that it should be returned to the defendant; also, that the latter had applied the money as agreed. Held no error; that the paper was but evidence of part of the agreement, and it was proper to show in defence the whole transaction: *Juilliard v. Chaffee*, 92 N. Y., 529.

A parol agreement and direction by the assignor, at the time of assigning a promissory note, that the assignee shall not sue the maker until requested, that the assignor would stand liable as such without suit until he gave notice to sue,

is not void; it does not vary the effect of the written indorsement, but merely fixes the degree of diligence required of the assignee to hold the assignor, and in a suit against the assignee is admissible in evidence, if alleged in the complaint; and, in such case, evidence by the assignee that land mortgaged to secure the note, which, on foreclosure not promptly obtained, sold for \$1, was at the time of the assignment worth enough to satisfy the note and all older liens, is not admissible, and the sum realized by the sale must be taken as the value when sold: *Schwired v. Frank*, 86 Ind., 205.

An indorser in blank may show that he indorsed the same as guarantor, and that the indorsee failed to exercise due diligence in collecting the note: *Withers v. Berry*, 35 Kans., 373.

[6 Appeal Cases, 24.]

H.L. (E.), Nov. 24, 27, 1880.

[HOUSE OF LORDS.]

*WILLIAM AND FRANK DEBENHAM, *Appellants*; [24
and ALFRED MELLON, *Respondent*.

Husband and Wife—Necessaries—Agency—Notice not to trust.

Where the husband neither does, nor assents to, any act to show that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact.

The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise where such management did not exist.

A. was the manager of a limited company's hotel at Bradford—where his wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication:

Held (affirming the judgment of the court below), that the husband was not liable—that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust the wife.

APPEAL against a decision of the Court of Appeal which had affirmed a judgment of the Queen's Bench, Division upon a ruling of Mr. Justice Bowen.

The appellants brought an action against the defendant for the price of goods supplied to his wife. The statement of claim described the goods as sold and delivered to the defendant, ordered for him by his wife as his duly authorized agent in that behalf.

The defence denied that the goods were ordered by the defendant's wife as his agent, alleged that his wife was not his agent in that behalf, and had no authority express or implied to pledge his credit for the goods, as the plaintiffs knew or ought to have known. Issue thereon.

25] *The cause was tried in London before Mr. Justice Bowen and a jury. The plaintiffs were drapers in London—the goods were admitted to be necessaries suitable for the condition of the wife, and the prices were admitted to be reasonable. It appeared from the evidence offered by the defendant, that, by an arrangement between the husband and wife he was to furnish her with £52 a year (on some occasions increased to £62) with which she was to supply herself and their children with clothes, and that he had positively forbidden her to exceed that allowance. The husband and wife were employed as manager and manageress of the hotel of a (limited) company, first in Devonshire and then at Bradford. They lived together in the ordinary way. The question left by the judge to the jury was whether at the time when the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so. This question was answered in the affirmative, whereupon judgment was ordered to be entered for the defendant. The Queen's Bench Division refused a new trial.

The plaintiffs appealed, and the case was heard before Lords Justices Bramwell, Baggally and Thesiger, who, following and adopting the decision in *Jolly v. Rees* ('), affirmed the ruling in the court below ('). This appeal was then brought.

Mr. Benjamin, Q.C., and Mr. A. L. Smith, for the appellants: The decision in this case depends on that of *Jolly v. Rees* ('), which was not the unanimous judgment of the court, and which it is submitted cannot be, in principle, sustained. There is no question as to the goods being necessaries suitable to the condition of the wife, nor any as to the fact that the parties were cohabiting as man and wife, but the defence is that the husband had forbidden his wife to pledge his credit, and that consequently the husband

(') 15 C. B. (N.S.), 728; 33 L. J. (C.P.), 177.

(*) 5 Q. B. D., 394.

was not liable for goods supplied upon her order. Assuming it to be proved that the husband had forbidden the wife to pledge his credit, his doing so being perfectly secret, it could not be binding as against the rest of the world, who had never received any notice of it, and had no reason to suspect its existence. *A wife has, what may be called, [26 apparent, or ostensible authority to pledge her husband's credit for things that are required in the family and are necessaries for the family. It is admitted that, as a rule, where a tradesman is aware that a wife had been forbidden to contract any debts, if he enters into dealings with her he does so at his peril. But even that rule was not wholly without exception, as where a man turned his wife out into the world without any, or even without a reasonable allowance, *Bolton v. Prentice* (*), she was entitled to provide necessaries for herself at his cost: *Emmett v. Norton* (*). In Comyn's Digest (Baron and Feme Q.) it is said "if a wife buy necessary apparel for herself the assent of the husband shall generally be intended." That was again and again asserted in the observations of all the judges in the old case of *Manby v. Scott* (*), which case was the foundation of the doctrine now sought to be applied in all cases for the advantage of husbands. The observations there qualified the decision itself. And it was to be observed that in that case the "plaintiffs had been forbidden to sell to or trust the wife," and consequently that express prohibition to them did afford an answer to their demand. There, too, the wife had wilfully absented herself from her husband's house for a long time and then attempted to force her society upon him, so that in no way whatever could the case be deemed a precedent for the present decision. Nor was the case of *Montague v. Benedict* (*) applicable here, for the goods there supplied were distinctly not necessaries, and the conduct of the plaintiffs left little doubt that they were well aware that the husband knew nothing of the transaction. So in *Seaton v. Benedict* (*) the circumstances were similar, but the point really decided there was that too much weight had been given by the judge, at the trial, to the effect of a payment into court, and a new trial was ordered on that ground. In *Ruddock v. Marsh* (*) it was held that a wife is the agent of her husband for such things as are usually under the control of the wife (a doctrine which had been stated almost in the same words by Mr. Justice Bayley in *Montague v.*

(*) 2 Str., 1214.

(*) 8 C. & P., 506.

(*) 1 Sm. L. C., 341; 1 Lev., 4; 1 Sid., 109.

(*) 3 B. & C., 631.

(*) 5 Bing., 28.

(*) 1 H. & N., 601.

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Benedict (') and so the husband was held liable for provisions supplied to the family, though *it was proved that he regularly paid his wife an allowance to keep the house. That case ought to govern the present. In *Johnston v. Sumner* (') it was expressly stated that during cohabitation a wife has implied authority as the agent of her husband to pledge his credit for necessities suitable to her station notwithstanding any private agreement between them; but there the husband and wife were separated, she had a sufficient allowance, and the things furnished were expensive dresses, in no respect suitable necessities. In *Todd v. Stokes* (') the husband was held not liable because the parties had separated and she had an allowance, which was generally known. And the same rule appeared to have been applied in *Hodgkinson v. Fletcher* (') where they lived separately from each other, and where there had been proceedings in the Ecclesiastical Court from which it was publicly known that the wife had an ample allowance. It was under those circumstances the husband was held not liable. Here there were no circumstances of that sort. In *Etherington v. Parrott* (') the parties cohabited, but there being distinct notice given to the tradesman, Lord Holt held, upon that ground, that he could not recover. In *Holt v. Brien* (') the husband was treated as not being liable, because the tradesman had full notice of the facts. [LORD BLACKBURN: The marginal note in that case is defective.] It does not state the matter fully, but the case itself shows that the court went upon the fact of notice. The case of *Freestone v. Butcher* (') was a strong illustration of the necessity of notice where even an implied liability had arisen, the things supplied there not being in any way necessities and the assent of the husband being little more than inferential.

The relation of husband and wife gives the wife a general credit for necessities, *Read v. Legard* ('), where that principle was applied, though the husband was a lunatic, and therefore incapable of expressing either assent or dissent. And that principle applied as to all matters under the proper control of a wife. Even the cases in which the husband has avoided liability admit that *principle: *Dyer v. East* (') and the recent case of *Read v. Legard* (').

(') 3 B. & C., 681.

(') 3 H. & N., 261.

(') 1 Ld. Raym., 444; 1 Salk., 116.

(') 4 Camp., 70.

(') 2 Ld. Raym., 1006; 1 Salk., 118.

(') 4 B. & A., 252.

(') 6 C. & P., 643.

(') 6 Ex., 636.

(') 1 Mod. 9 (per Kelynge, C.B.)

It was also affirmed in *Story on Agency* (*). And in *Waithman v. Wakefield* (*), Lord Ellenborough had said, "Where a husband is living in the same house with his wife he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value." It was expressly on that ground that the husband was held liable in *Ruddock v. Marsh* (*), and the same principle was applied in all the cases, the exception being, in every instance, confined to such as arose from the particular circumstances of the individual case. The mere representation made by the man that the woman was his wife had been held to make him liable for necessities supplied to her, *Munro v. De Chemant* (*); and in *Ryan v. Sams* (*), where, though the woman was known not to be the wife, yet, as the man had treated her for some time in the character of wife, and had allowed her to order fittings up for the house they occupied, and had paid for those fittings, he was considered to have constituted her his agent, so that he was held liable upon similar orders given by her after they had really separated, the tradesmen not having had any notice of the fact of the separation. It would be absurd to treat in such matters a wife as less an agent of the husband than one man would be the agent of another in a matter of ordinary business, even without any partnership between them. A few acts done by B. in the matter of the business of A., and acted upon by A., were allowed to go to the jury in proof of agency, which, if once established, required notice to the person dealt with, before that agency could be denied. And the doctrine of apparent agency and continuing credit was exemplified in *Norton v. Fazan* (*), where the absence of notice sufficed to make the husband liable, though he had in fact separated from his wife and she was living in adultery. Where, as in this case, the tradesmen dealt with the wife in ignorance and good faith, and the things supplied were really necessities, and the parties were cohabiting with each other, nothing but distinct notice could free the husband from his liability. [29

Mr. *Willis*, Q.C., and Mr. *McGall*, for the respondent: In this case it should be recollected that, in fact, the plaintiffs had never known anything of the defendant, had had previous dealings with the wife, and with her alone, and had made out their bills in her name, and therefore never could

(*) §§ 17, 126.

(*) 1 Camp., 120.

(*) 1 H. & N., 601.

(*) 4 Camp., 215.

(*) 12 Q. B., 460.

(*) 1 B. & P., 226.

set up anything in the way of proof of the husband's assent to her acts. She came to the plaintiffs as a perfect stranger, ordered goods from them, which they supplied, and for which, having previously given credit to her individually, they now sought to charge her husband. The facts of the case, therefore, were strongly adverse to the claim now put forward. They had in truth no knowledge of the husband till they set up this claim against him for goods which the wife had purchased without his knowledge and against his formal prohibition. The principle which ought to govern a case like the present was stated by Lord Chief Justice Cockburn in *Atkyns v. Pearce*(¹), namely, that there being a sufficient allowance provided, there was no necessity for pledging the husband's credit. There was no ground for supposing that the presumption of agency arising from the cohabitation could only be contradicted by notice to the tradesman. In *Renoux v. Teakle*(²) the husband and wife were living together; he made her an allowance for dress, she bought articles of dress beyond her allowance, and the husband was sought to be charged; he was held not liable, though there was no proof of notice; and the fact that she had bought other articles of dress from other people, besides those furnished by the plaintiff, was admitted in evidence as rebutting any presumption of agency that might arise from cohabitation. *Bolton v. Prentice*(³) cannot be treated as an authority for the appellants, for the only question really decided there was that when a man causelessly turned his wife out of doors he could not declare a general prohibition to give her credit, so that she could not get necessities anywhere, and might be left to starve. In *Reid v. 30] Teakle*(⁴) the *question was whether the case had properly been left to the jury; the goods supplied there consisted of music books, and the only question put to the jury was whether music books were necessities, which the court thought wrong, and so directed a new trial. In *Atkins v. Curwood*(⁵) it was expressly declared that a husband is not bound by the contracts of his wife unless made with his assent. In *Freestone v. Butcher*(⁶) there was no question as to necessities, the things purchased were foreign birds, and the husband was held liable because he had fitted up a room for their reception, and his assent to the purchase was therefore considered clear. The same observation applies to *Munro v. De Chemant*(⁷) and *Ryan v. Sams*(⁸). In

(¹) 2 C. B. (N.S.), 768; 26 L. J. (C.P.), 252.

(²) 8 Ex., 680.

(³) 2 Str., 1214.

(⁴) 12 C. B., 627; 22 L. J. (C.P.), 161.

(⁵) 7 C. & P., 506.

(⁶) 6 C. & P., 643.

(⁷) 4 Camp., 215.

(⁸) 12 Q. B., 460.

Mizen v. Pick (¹) it was expressly declared that where there was a sufficient allowance notice to the tradesman was not material, and that was the principle acted on in *Richardson v. Du Bois* (²). Here there was a sufficient allowance; there was an express prohibition, and if there was no notice it was clear that the appellants had never known anything of the husband, and had never, in reality, supplied the goods on his credit.

The case of *Montague v. Benedict* (³) laid down the rule clearly that the husband is not liable if he supplies his wife with proper necessaries. And the question of the sufficiency of the allowance was not one on which a court can, of itself, establish the liability of the husband, *Eastland v. Burchell* (⁴), where the judge of a county court having on that ground given a judgment against the husband, his decision was set aside.

In *Shoolbred v. Baker* (⁵), Mr. Justice Willes treated the case as settled in the law of England—and in an Irish case, *Moylan v. Nolan* (⁶), the judges of the court agreed that the payment of a sufficient allowance for the supply of the household would be an answer to any presumption arising from the mere relationship of husband and wife, even though the goods supplied were necessaries for the family, and were left at the husband's house and consumed in the family of the husband.

*Mr. Benjamin replied.

[31

1880. Nov. 27. THE LORD CHANCELLOR (Lord Selborne): My Lords, you are asked in this case to review the decision of the Court of Common Pleas in 1864, in *Jolly v. Rees* (⁷), the correctness of which, as far as I know, has not been seriously controverted since that time.

The point determined was one of much importance; namely, that the question, whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.

That principle is now controverted; and the first question before your Lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent in law of her husband, to bind him, and to pledge

(¹) 3 M. & W., 481.

(²) Law Rep., 5 Q. B., 51.

(³) 3 B. & C., 651.

(⁴) 3 Q. B. D., 432; 28 Eng. R., 362.

(⁵) 16 L. T., 1357.

(⁶) 17 Ir. C. L. Rep., 427.

(⁷) 15 C. B. (N.S.), 628; 33 L. J. (C.

P.), 177.

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his credit, by what otherwise would have been her own contract, if she had been a *feme sole*? On that point, I think it enough to say, that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise, when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her,—but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *prima facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing.

I therefore lay aside that proposition; and, thinking it clear, that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question; whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on 32] what principle? Cohabitation is not *(like marriage), a *status*, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities, which show that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some *prima facie* evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do. Mr. Benjamin says, that those words are not the best which might be used for the purpose; but that “apparent authority,” or “ostensible authority,” would be better. I am not at all sure that Mr. Benjamin’s words may not be very good words, for that ordinary state of circumstances, in the case of cohabitation between husband and wife, out of which the ordinary presumption arises; because, in that state of circumstances, the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. Then, the word “apparent,” or the word “ostensible,” becomes appropriate. But where there has been nothing done, nothing consented to, by the husband, to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority,

must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *prima facie*, and not absolute; not a presumption of law, but one capable of being rebutted. When Chief Baron Pollock, in *Johnston v. Sumner* (1), said, that all the usual authorities of a wife under those circumstances might be assumed, "notwithstanding any private arrangement," I suppose him to have had in view that state of facts, under cohabitation, when a *wife is managing her husband's house and [33 establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife. The same learned judge in another case which was cited during the argument, viz., *Reneaux v. Teakle* (2) said, that the case of the wife, in principle at all events, was not different from that of anybody else at the head of an establishment. If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does, arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man, and passing as his companion, with or without the assumption of the name of wife. It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. Therefore it is, in all these cases, really a mere question of fact.

Now, my Lords, in the present case, that ordinary state of circumstances which usually accompanies cohabitation where there is a house and an establishment, is entirely wanting. There was here no house, no establishment; none of those things was done, in the way of living upon credit, to provide for the ordinary and daily wants of a family or an

(1) 3 H. & N., at p. 268.

(2) 8 Ex., at p. 682.

establishment, which commonly raise the presumption. The husband and wife were both servants of a company of hotel keepers at Bradford. They lived in the hotel, which belonged to their employers; their whole board and lodging (which I take, upon the evidence, to have included that of their children) being found for them by the company; and therefore there was, in point of fact, no domestic management at all. The credit, such as it was, was given by a London tradesman to a woman living in Bradford in these circumstances. No single act is shown to have been done by him upon the faith of any appearance of authority in the 34] wife; he made out all the bills to *the wife in her own name. This, no doubt, would not have prevented him from recovering against the husband, if the husband was otherwise liable, but it certainly does not tend to show that he supposed he was giving credit to the husband; much less that he was misled into doing so by any conduct of the husband. That the husband never knew any of these things is perfectly clear. The necessary conclusion of fact is, that the husband did not hold out his wife as having any authority, by any act, or by any course of conduct, either to the plaintiff or to any other persons, of whose dealings the plaintiff might be presumed to have cognizance.

Then, if the plaintiff can recover at all, it can only be because there was, notwithstanding this state of things, an actual authority in point of fact. But the evidence conclusively shows, that there was no such authority. It is said, that, when this married pair lived, four or five years before the beginning of the dealings between the wife and the plaintiffs (much more than that time before this particular debt was contracted), at Westward-Ho in Devonshire, there were some other people who did give credit to the husband, the wife then acting as his agent. That the plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the plaintiff began that state of things, being disapproved of by the husband, was put an end to. The husband at that time expressly determined and revoked any authority, which he might previously have given to the wife; and he afterwards, at the time when this debt was contracted, was making her an annual allowance more than sufficient for any necessary purposes of her clothing, according to the state of their circumstances and condition in life. It is said that of that revocation the plaintiff had no notice; but the plaintiff had no notice of the circumstances which made the revocation necessary, he never had

notice of any single fact material to the question of authority, except that she was a married woman.

It was argued that, because these articles were found to be in some sense "necessaries" in their nature, the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it: much less can he be bound in a case like this where they were not living apart, and when he made her an *allowance sufficient to cover all proper expenditure for her own and her children's clothing. [35

These observations dispose of the whole case; but I must add, without going into the authorities, that if the principles which run through them from first to last are regarded (as they ought to be) rather than casual *dicta* colored (as they necessarily must be) by the circumstances of particular cases, the whole of those authorities are really consistent with each other, and with the decision which was arrived at by the majority of the Court of Common Pleas in the case of *Jolly v. Rees* (').

Therefore, my Lords, I move your Lordships that this appeal be dismissed, and the judgment of the court below affirmed.

LORD BLACKBURN: My Lords, if it were not that this case is precisely identical with the case of *Jolly v. Rees* ('), I should think it desirable to speak more at length than I propose now to do. The opinion upon which I advise your Lordships to act is that the judges forming the majority of the court in that case were right in the judgment which they gave; and it is admitted that that governs the present case. I also think that the judgment which my brother Byles gave upon that occasion (which it is admitted might, if it were good, apply to the present case) was not correct as applied to that case, and is not applicable now.

I premise, as did the majority of the court in *Jolly v. Rees* ('), by saying that no question arises here as to what would be the case if the wife had been left destitute, and had not been allowed what was proper for her estate and condition. If there had been desertion and cruelty, so that she had not been supplied with what was proper, no question arises here as to whether she would not have had authority to pledge her husband's credit to get such things. That is not the case here at all. This is simply a case where a husband is living with his wife, though they are not keep-

(') 15 C. B. (N.S.), 628; 33 L. J. (C.P.), 177.

ing up any household establishment ; and he in fact makes her an allowance which both husband and wife seemed to think, so far as one can judge from appearances, would be sufficient to enable her to supply herself with all necessary 36] clothes. She did *get clothes, and there was evidence which satisfied the jury that the husband really and truly told her that she was not to pledge his credit, and that she had assented.

The question comes to be, first, had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he intrusts her with such authorities as are commonly and ordinarily given by husband to wife. I should say that it might be a matter of doubt whether it is so perfectly certain that the articles supplied by milliners are always to be procured upon the credit of the husband, so as to make that a *prima facie* part of the authority. But I will assume that it would be so. In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butcher's and baker's bills and such things ; and for those she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the court in *Jolly v. Rees* (1), and also by the judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions, by paying them or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority

(1) 15 C. B. (N.S.), 628; 33 L. J. (C.P.), 177.

and sanction. That would be the general rule, for where an agent is clothed with *an authority, and afterwards [37 that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, "The principal is precluded from denying that that authority continued to exist, which he had led us to believe, as reasonable people, did formerly exist." Now there may be many cases in which the husband has so sanctioned his wife's pledging his credit, but there is not any such case here. The case in Ireland to which we have been referred, seems, as far as I could see by a slight glance, to be a case where the husband had assented to the contracts in such a way that he could not deny them afterwards. With that we have nothing at present to do. But I cannot agree with my brother Byles that there is any authority established by the cases that the fact that a wife is living with a husband, alone entitles the tradesmen to presume that the husband has given an authority so as to preclude the husband from denying it. I think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, it being a question for the jury whether a *bona fide* authority did or did not exist. This is not a case of withdrawing authority once given. The question is whether the plaintiffs who had never dealt with the husband before were entitled to assume that there was such an authority to the wife implied in the mere fact that the wife was living with her husband; and I think the law is not so.

LORD WATSON: My Lords, in this case I shall content myself with saying that, notwithstanding the able and ingenious argument of the learned counsel for the appellants, I am very clearly of opinion that both upon principle, and according to the authorities, the case of *Jolly v. Rees* (') was well decided; and I therefore concur in the judgment which your Lordships propose.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 27th November, 1880.

Solicitors for appellant: *Boyce & Ridley.*

Solicitors for respondents: *Button, Grove & Co.*

(') 15 C. B. (N.S.), 628; 33 L. J. (C.P.), 177.

See 29 Eng. R., 361 note.

The case here reported is an affirmation of 5 Q. B. Div., 894, 29 Eng. Rep.,

852. The case here reported is also reported, 20 Amer. Law Reg. (N.S.), 816, 824 note.

In an action against a husband for necessities supplied to his wife, the jury were instructed that "the plaintiff must prove, in order to recover, that the goods sold and delivered were necessary and suitable to the condition in life of the defendant's wife; that she was not otherwise provided for by her husband." Held, that this instruction was applicable whether the husband and wife were living together or separately, and therefore covered all the questions of law on that branch of the case.

To render a husband liable for necessities furnished to his wife, it is not essential that he should have refused to supply them; his neglect to do so will make him equally liable.

A wife, who had been living with her husband at a hotel, went, with his consent, to live at a house owned by him, under an agreement that she should live there with an allowance from him of a stated amount, until they could make arrangements, which they were then negotiating, for a separation. The husband remained at the hotel, but frequently visited the wife, and continued matrimonial cohabitation with her. Held, that there was no separation in the legal sense, such as would affect the liability of the husband for necessities supplied to the wife.

The custom of a tradesman to enter in his books the names of married women who deal with him, although the credit is given to their husbands, may be proved in explanation of such entries, when produced in evidence in an action against a husband, for goods charged to his wife in the plaintiff's books. The question to whom the credit was given is one of intent, and is the controlling issue.

Where the defence in an action against a husband for necessities purchased by his wife is, that the wife was, at the time of the purchase, living separate from him, evidence tending to show cruelty and ill treatment of the wife by the husband, as the cause of the alleged separation, and the time of such cruel treatment, is not objectionable merely on the ground of immateriality: *Arnold v. Allen*, 9 Daly, 193.

A husband is not liable even for necessities furnished his wife while residing apart from him, without his

consent and without good cause; yet if the separation is caused by improper treatment on his part, such as would justify her in leaving him, he is liable for her necessary support, and to that extent she may avail herself of her common law remedy of obtaining support on his credit.

In an action against the husband, by one who has furnished necessary support to his wife while living apart from him, it is competent for the plaintiff, in support of her claim, to show, by proper evidence, the manner in which the defendant had treated his wife prior to the separation, leaving it for the jury to say whether his conduct was such as to justify the wife in refusing to live with him: *Wilson v. Bishop*, 10 Bradw. (11s.), 588.

An action for the price of milk delivered to a wife against her husband's express request, while she was living apart from him, cannot be maintained against the husband in the absence of evidence that she was living apart from him under such circumstances as gave her implied authority to bind him by a contract for necessities: *Benjamin v. Dockham*, 132 Mass., 181.

A promise by a husband to pay for necessities which have been furnished to his wife upon his credit, if they are such as he is bound to supply her with, although accompanied by a direction to sell no more goods to her on his credit, amounts to a ratification of her contract upon which an action may be maintained, even if she had no previous authority to purchase them: *Conrad v. Abbott*, 132 Mass., 380.

If a husband and wife live apart by mutual consent, the wife receiving a sum not sufficient for her support, and agreeing that she will release her dower in his land, thereafter support herself and make no claim upon him, he is not liable for necessities furnished to her, she not having, after such arrangement between them, made any claim upon him for support, or offered to return to him: *Allen v. Winn*, 134 Mass., 77.

The law casts on the surviving husband the duty and legal obligation of burying his deceased wife, and of paying for the proper funeral expenses. No one except the wife, by her own contract, can create a charge on her equitable separate estate, and no one

can after her death incur any debt for which such estate can be made liable: *Lott v. Graves*, 67 Ala., 40.

A declaration for the price of milk delivered to defendant, at his request, is supported by proof of a delivery to defendant's wife, while living apart from him, without means of support, by reason of his cruelty: *Benjamin v. Dockham*, 134 Mass., 418.

In a suit against a husband to recover for goods furnished to his wife, it is not necessary that she be made a party defendant: *Burgan v. Caboon*, 39 Leg. Int., 267.

An insane wife absent from her husband, and in pressing need of food and shelter, is a "poor person" within the meaning of the provision of the Revised Statutes (1 R. S., 616, § 14), providing for the maintenance of such persons by the county or town.

A husband who has voluntarily permitted his insane wife to absent herself from his house and to become a public charge, is liable to an action at the suit

of the proper town or county officers for her support, and is estopped from denying, in such action, that she is a pauper.

Such an action cannot be defended upon the ground that the wife abandoned her husband, as an insane wife is incapable of so doing, and it is the duty of the husband to protect and support her: *Goodale v. Lawrence*, 88 N. Y., 513.

A widowed mother has the same control over, and owes the same obligation to, her minor child as the father would have, and owe, if alive. Where a widowed mother places her minor child with another for support, and thereafter becomes insane, her estate will be liable for necessaries furnished the child during its minority: *Girls, etc., v. Fritchey*, 10 Mo. App. 344, 347.

As to the liability, by statute, of the wife for articles used in the support of her family, see *Lewis v. Dillard*, 61 Ala., 1.

[6 Appeal Cases, 38.]

H.L. (E.), Nov. 16, 17, 23, 24, 1880; Jan. 13, 1881.

[HOUSE OF LORDS.]

*ROBERT H. DAHL (trading as Dahl & Co.), *Appellant*; and NELSON, DONKIN and Others, *Respondents* (').

Ship—Charterer's Duties—Docks—Delay in discharging—Demurrage.

A charterparty for a ship to sail to "London Surrey Commercial Docks" is not satisfied by the ship arriving at the gate of the docks but not entering into the docks.

There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks.

The charterparty was to "London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material.

The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat) and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf:

(') Affirming 12 Chy. Div., 568.

1880-1

Dahl v. Nelson, Donkin & Co.

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Held, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading.

The contract in the charterparty as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days demurrage over and above the said laying days" [there were no laying days mentioned in the charterparty] "at £30 per day, payable day by day, it being agreed that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense."

The ship did not fulfill the engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner [30] was not bound to wait for an unreasonable *period, until the dock authorities should be able to assign the ship a discharging berth in the docks.

When that difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges.

Held, that he was warranted in so doing.

APPEAL against a decision of the Court of Appeal, in an action for demurrage and landing charges, in respect of the ship *Euxine*.

The appellant was a timber merchant in London. The respondents were shipowners at Newcastle. The appellant had on the 21st of June, 1877, entered into a charterparty with the respondents in respect of their steamship *Euxine*, which was to proceed to Soderhamn, and there load a cargo of deal timber. The charterparty stipulated that the *Euxine* "being so loaded shall therewith proceed to London Surrey Commercial Docks, or so near thereunto as she may safely get, and lie always afloat, and deliver the same on being paid freight." The charterparty contained the following stipulations: "The freight to be paid on unloading and right delivery of the cargo. . . ." The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above . . . And ten days on demurrage over and above the said laying days" [there was no statement as to the number of laying days] "at £30 per day, payable day by day, it being agreed upon that for the payment of all freight, dead freight, and demurrage the owner shall have absolute charge and lien on the said cargo. The cargo to be brought to, and taken from, alongside the ship at merchant's risk and expense . . . If ordered to London

the steamer to discharge in one of the docks in the river Thames, the freighter to pay two-thirds of the dues."

The cargo was received on board at Soderhamn between the 21st and 28th of July, 1877, and the Euxine reached the port of London on the 4th of August, 1877, and on the same day proceeded to the Surrey Commercial Docks. It did not obtain entrance there, the docks being at that time quite full. The appellant *had on the 16th of July, 1877, [40 obtained, signed, and sent into the dock authorities the usual form of order required by them to authorize the ship to enter the docks, but the dock manager declined to receive the order on the ground that the docks were not only then completely full, but that for some time to come they would be so, and no berth could be assigned to the Euxine. The appellant made another attempt, but in vain, to obtain the entry of the ship under the order. It was well known that, from the superior skill possessed by the persons employed at the Surrey Commercial Docks in unloading and classifying timber, a cargo of timber there discharged acquired a higher value in the market. On the 4th of August the Euxine arrived at the entrance of the docks; it was refused admission. The respondents then required the appellant to name another dock for the discharge of the cargo, but he declined to do so. The master then took the Euxine to the Deptford Buoys, the nearest place to the docks where the vessel could lie in safety afloat, and thence, by lighters, he effected the discharge of the cargo. The lighters carried the timber into the Surrey Commercial Docks, the last lighter going in on the 31st of August, 1877, but the whole of the timber was not landed on the wharf till the 28th of October, 1877. The respondents served notices under the Merchant Shipping Act, 1862, on the appellant that the timber was there deposited, and also on the dock authorities that it was so deposited, subject to lien for freight, charges, and demurrage. The appellant deposited £2,000 with the dock company to meet these claims, and then received the timber.

An action was brought by the respondents on these claims for demurrage and charges upon the ground that the appellant, as charterer of the vessel, was bound to provide for the entry of the vessel into the docks, and was therefore liable for the delay which had occurred. The appellant denied his liability, and made a counter-claim for damages on account of the stop put on the delivery of the cargo, by the service on the dock company of the claim for lien for freight, charges, and demurrage; and also for alleged injury

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to the timber by reason of the unfitness of the lighters employed. The Master of the *Rolls* (before whom the case was tried, without a jury) decided that the alleged custom which bound the charterer to secure the admission of the 41] vessel *into the docks was not proved, and that the obligation to provide a berth lay equally on both parties, that as the ship had "not gone inside the dock gates," the voyage had not been completed within the terms of the charterparty. His Lordship therefore ordered the action to be dismissed. On appeal this decision was reversed⁽¹⁾.

Mr. *C. Russell*, Q.C., and Mr. *A. L. Smith* (Mr. *R. T. Reid* was with them), for the appellant, contended that the voyage had not been completed, and that the ship was not to be treated as an arrived ship, as it had never entered the docks named in the charterparty as the place of destination. The liability of the charterer for delay in unloading had therefore never arisen, and consequently the charge for demurrage could not be sustained.

Mr. *Bejamin*, Q.C., and Mr. *Cohen*, Q.C. (Mr. *Rigby* was with them), for the respondents, contended that the default in not entering the docks was attributable to the appellant, who was bound by the general law, as the charterer, and by the custom of the timber trade in the port of London, to secure the admission of the vessel into the docks named, and if he could not obtain such admission there, he was bound to name some other docks where the vessel could be discharged, for that the shipowner was not bound to wait for an indefinite time in anticipation of the possibility of a berth in the Surrey Commercial Docks being procured for the discharge of the vessel. Here too the appellant had, in fact, hindered the steamer from being admitted into the docks.

The cases cited and the arguments in detail are so fully discussed in the judgments of the noble and learned Lords as to render a more extended report of them unnecessary.

1881. LORD BLACKBURN: My Lords, the question in this case is, whether the defendants have broken the contract into which they have entered with the plaintiffs; and the first matter to be considered is, what was that contract?

It is contained in a charterparty, dated on the 21st of June, 1877, in a printed form filled up in writing, made between the *plaintiffs, owners of the *Euxine* steamship, and the defendants, by which it is agreed that the *Euxine* should proceed to a port named, and there load from the defendants a full cargo of deals. This was done, and there is no dispute about that part of the contract. The charter-

(1) 12 Ch. D., 568.

party then proceeds,—that the Euxine “being so loaded shall therewith proceed to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver the same on being paid freight” at a specified rate, certain perils mentioned always excepted. The other provisions which are material are as follows: “The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above. And ten days on demurrage, over and above the said laying days, at thirty pounds per day, payable day by day, it being agreed upon, that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge in lien on said cargo. The cargo to be brought to and taken from alongside the ship at merchant’s risk and expense.”

The Euxine was not delayed or hindered by any of the excepted perils, and arrived at the entrance of the Surrey Commercial Docks. It was refused admittance to the docks under circumstances which I shall state more fully afterwards.

The plaintiffs tried to prove that there was a custom in London as regards this trade, such as to be tacitly incorporated in the written contract. In this they failed, and consequently the liabilities which the parties have by the contract taken upon themselves must depend on what is the true construction of the charterparty.

The plaintiffs contended in the court below that by such a charterparty as this the merchant undertakes to procure the ship admission into the docks. Neither the Master of the Rolls nor the judges in the Court of Appeal took this view of the charterparty, and it was not much urged at your Lordships’ bar. I think it is clear that it is untenable. The legal effect of the contract, in my opinion, as far as regards the shipowner is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the discharging place agreed on in the charterparty. *That is, in this case, the Surrey Commercial Docks [43 (which must, I think, mean inside the docks), with an alternative, “or so near thereto as she may safely get and lie always afloat.”

The legal effect, as regards the obligation on the merchant, is, I think, that he binds himself, on the ship arriving at the place where it is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and

expected, it got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship may not get safely farther than the entrance of the docks, and is entitled to require the merchant to take delivery in the river (which is what it is said by the plaintiffs has happened in this case), the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that, instead, it should go into some other dock.

If the ship had been permitted to get into the docks and lie there, but had been unable to get to a discharging berth, the merchant might have brought lighters to it and taken delivery in the middle of the docks, whether he was bound to do so or not; I do not say, for it is not necessary to decide what would have been the rights and liabilities of the parties if the ship had been admitted inside the dock gate, as this did not, in fact, happen. I will only observe that, though in the printed form it is said "and ten days on demurrage over and above the said laying days" there are no laying days provided in this charterparty in the sense in which I understand these words, and the ten days on demurrage can only begin after the ship has been, at the place where the merchant ought to have taken delivery, long enough for the merchant to be in default for not having completed the discharge. There is no period specified in this charterparty within which the merchant has engaged that the ship shall at all events be discharged, which is what I understand by laying days. I think, therefore, that the cases (such as *Brown v. Johnson* ⁽¹⁾) deciding when lay days commence, have no direct bearing on such a charterparty as this. Both parties [44] agreed in naming the Surrey *Commercial Docks in the charterparty as the docks to which the steamer was to go. I can see nothing amounting to a contract either on the one side or the other to procure the ship admittance, nor has any authority been cited to the effect that such a contract is implied. If the charterparty had left it free to the merchant to select a dock, it may be well that he was bound to select one into which admittance could be procured. *Ogden v. Graham* ⁽²⁾ is an authority in favor of that position. And in *Samuel v. The Royal Exchange Assurance Company* ⁽³⁾, where the merchant directed the shipowner to proceed to the King's Dock at Deptford, and the ship arrived near the dock gates whilst there was much ice, but the merchant was not able to procure an order to admit it for

⁽¹⁾ 10 M. & W., 381.

⁽²⁾ 1 B. & S., 773.

⁽³⁾ 8 B. & C., 119.

some days, Lord Tenterden ruled that if the ship remained there waiting for an order to admit, it was an unreasonable delay, which would discharge the underwriters, but otherwise if the delay was on account of the ice. That authority seems to point the same way. I do not, however, pronounce any decision on this, as it is not the case now before the House. I only mention it to prevent it being said that what I now say would be applicable to such a case.

But where, as in this case, the dock is named from the beginning by both parties, I think the refusal of the dock authorities to let the ship inside the dock gates is the fault of neither party. They ought to have foreseen that it might happen that the dock company would, owing to the exigencies of their traffic, refuse to admit a steamer for some time; in fact, it appears from the evidence, that before the charterparty was made both parties knew that the number of timber-laden steamers was so unusually great at this time that it was very likely to happen that they would refuse for a long time. They might have made any new provision on which they could agree. If they had in terms said that, in the event of something for which neither party was responsible rendering it impossible to get into the dock at all, or without a delay so great as to render it unreasonable to wait, the shipowner would, unless excused by some of the excepted perils, bring his ship to a discharging place in London, as near as might be to the dock, and deliver there, and that the merchant should take the *cargo there and [45 pay the freight, I think they would have come to as prudent an arrangement as could well be devised. They preferred to keep unaltered the old form, "or so near thereto as she may safely get," and be bound by whatever the legal effect of that might be.

Before proceeding farther I think it convenient to see what, on the evidence, were the facts on this part of the case.

The practice of the Surrey Commercial Docks was to give orders for the admission of steamers to their docks to discharge there, which were, in practice generally, on the application of the charterer or his representative, made either before or after the arrival of the steamer. By giving such an order the dock company agreed to admit the steamer, and on the production of the order, after the arrival of the steamer, it was, as soon as practicable, admitted into the docks. The company, in practice, limited the number of the orders to so many steamers as they at the time thought they could accommodate with discharging berths.

On the 16th of July Messrs. Dahl, having probably heard

by telegraph that the Euxine was about to start, applied for an order for the admission of the Euxine. The superintendent of the docks, Mr. Ross (who died before the trial) wrote the two following letters: "19th July, 1877. Gentlemen,—Referring to the inclosed orders for the steamships Euxine and Chatsworth, I beg to inform you that, on looking over the list of Gravesend orders I have accepted, I fear I have rather exceeded the number of steamers for which I can safely provide accommodation during the months of July and August. Under these circumstances you may, perhaps, think it advisable in your interest to arrange for the vessels to be discharged elsewhere." "25th July, 1877. Gentlemen,—I much regret to be again compelled to return the indorsed order for the 'Euxine' (S.) from Soderhamn, but on going round the docks to-day I find my position is even worse than I anticipated. The quays are so loaded with goods that it will be impossible for me to afford the vessel anything like the usual steamboat dispatch."

On the arrival of the Euxine the ship's agents applied to the dock company to take the vessel, but were refused. It appears, on the evidence, that there was plenty of room 46] inside the dock *for the Euxine to lie afloat, but that the company would not admit any steamer until there was a prospect of being able, within a reasonable time, to give it a discharging berth. The legal advisers of the defendant thought (whether correctly or not it is not necessary to decide) that if once admitted within the dock gate, the merchants would be answerable for all subsequent delay, and the defendant pressed Mr. Griffin, the secretary of the dock company, not to let the Euxine enter the docks until they could give her a discharging berth. The secretary, to relieve his mind, on the 7th of August sent a telegram to the superintendent in these terms: "Can you give Euxine immediate discharging berth? If not, on no account admit steamer into dock."

This was relied on by the plaintiffs as proving that the defendant hindered the steamer from entering the dock. But it is clear, from the evidence of Mr. Griffin (the dock secretary) that the dock authorities, in their discretion, refused to admit any steamers other than those they had already engaged for, (though there was plenty of room for them to lie without discharging,) until there was a prospect of giving it a discharging berth, and that he refused to admit the Euxine, on the 7th of August, because he could not then give the steamer a discharge berth, and not on account of the defendant's request, and, on being asked the ques-

tion expressly, he says that he had no prospect of being able to give a berth after a short delay, or within any reasonable time. The dock authorities, it seems to me, acted very properly and prudently in what they did, but even if they were wrong, the defendant was not responsible for this.

Though the secretary must, at the time he gave his evidence, have known when, as it really turned out, a steamer arriving on the 7th of August could have had a discharging berth, neither side asked that question. He does say that, if it had been admitted into the dock to lie afloat, it would, in the then state of the traffic, have been five weeks before the ship could have been discharged into lighters there, from which it would seem that it would have been longer before it could have got a discharging berth, and, as demurrage was at £30 a day, it is obvious that the consequences of the delay would have been serious. I may observe that the anxious desire of the defendant that the steamer should *not be admitted within the dock gate, when he [47 believed (whether rightly or wrongly) that the doing so would fix him with the cost of the delay, is evidence that he believed the delay would be important.

The plaintiffs' legal advisers wrote to the defendant the following letter, and received the following answer: "7th August, 1877. We are instructed to inform you that the ship *Euxine*, chartered by you, is in this port ready to discharge. The Surrey Commercial Docks Company have declined to allow the vessel to enter their dock, as they, we learn, intimated to you several days ago. The ship's lay-days begin to-morrow. Should she not be discharged by you with the usual dispatch, you will be held answerable for demurrage. Your lighters should be alongside, as you have been already informed, by the first thing to-morrow morning. The cargo would be discharged in two or three days. This notice is given you that you may take such steps as you think right to expedite the unloading of the ship." "Re *Euxine*. 8th August, 1877. Our legal advisers tell us to say, in reply to your favor of yesterday, that: The ship is chartered for the Surrey Commercial Docks, and that when the vessel is there, we will be prepared to fulfil your client's contract with us, and take delivery of the cargo. The notice given by you is one which you have no power to give, and which we are not called upon to obey. If the captain enters into a contract to go to a particular dock, he must go there, and it is no business of the receivers that the dock at the time of his arrival is full and cannot take him in. He must wait till there is room." Some

attempts were made to come to an amicable settlement, which unfortunately failed, and both parties stand on their legal rights.

It is perfectly plain to my mind that the ship did not fulfil the primary engagement in the charterparty to proceed to the Surrey Commercial Docks by merely proceeding to the gate of that dock, but if, under the circumstances, the ship had on the 7th of August, fulfilled the alternative of proceeding "as near thereto as she may safely get," the merchant was, by his agreement, to take the cargo from alongside at his risk and expense, and there is no reason why he should not have to bear all the damage occasioned by his refusal to comply with the request contained in the 48] letter of the 7th of August to send lighters alongside, which, on the assumption that she had got as near thereto as she could safely get, was what he had undertaken to do.

Two questions arose on these points: 1. Whether the *Euxine* could have got into the dock without such a delay as would have been unreasonable, taking into account the nature of the transaction and the interests of both parties. That was one of fact, to be determined on the evidence. 2. Whether, supposing that fact to be found in favor of the plaintiffs, the *Euxine* had got as near thereto as she might safely get, within the meaning of the contract. That was a question of law, depending on the construction of the written contract.

As far as regards the question of law, it is not material when or by whom the question was first raised; your Lordships having to decide it according to law. But as regards the question of fact depending on the evidence, it might be material when it was raised, for if the point had not been raised at all by the plaintiffs it would have been possible enough that the defendants refrained from calling farther evidence which would have altered the case.

But in fact, it appears by the shorthand writer's note that Mr. Chitty in his opening distinctly stated this as part of the plaintiff's case; and it was brought to the mind of the Master of the Rolls, for he afterwards asks Mr. Russell what he said was the meaning of the words "as near thereunto as she may safely get." A considerable argument ensued, Mr. Russell contending then, as he did afterwards, that the prevention must be physical, from something endangering the safety of the ship, and that it must be permanent; and when pressed he said that though the cause of obstruction was a physical one and one which would last a year,

the steamer must wait a year. The Master of the Rolls said, as I think he well might, "To suppose that two commercial men should enter into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, that that means that she is to wait outside for a year because the dock is out of repair, is to my mind absurd. (Mr. Russell :) If the proposition looks nonsensical, if your Lordship pleases, instead of being a year, suppose it is a month—(The Master of the Rolls :) I do not know that it is—*(Mr. [49 Russell :) Or a fortnight." So that there was ample to call on the defendant to produce whatever evidence he could to show that the delay in the present case would not have been unreasonable.

The expressions of the Master of the Rolls seem to indicate that at that moment he was not inclined to look with favor on this contention of the defendant. If such was his then opinion, he changed it, for in delivering judgment a few days afterwards he says⁽¹⁾: "I do not see any answer to the suggestion that the contract was to take the cargo there, and that the shipowner must wait until he could get into the dock. It makes no difference whether the cause of prevention was the dock being full of vessels, or some other accident. It might have been stress of weather, or that the vessel drew more water than there was over the silt of the dock at one time, assuming the water to flow in more at one period than at another, or it might have been an accident to the dock gates which prevented the vessel going in for a period of time longer or shorter, as the case might be. The shipowner takes the risk of accident; so does the charterer, because in this case the charterer has to wait for his cargo. There is a risk on both sides, and the risks in some cases depend very much on the nature of the vessel. In the case of a steamer, probably, the risk is larger on the side of the shipowner, but not necessarily so. There may be perishable cargoes, the value of which is very variable, as the price may depend on the speed with which they are delivered on arrival at the port of discharge. Therefore both parties to the charterparty take their chance of the vessel being able to get into the dock on arrival at the place of discharge within the usual or reasonable time."

I certainly understand from this that the Master of the Rolls thought it quite immaterial whether the incapacity to get into the dock was produced by a matter threatening the safety of the ship, or some other matter. In this the judges of the Court of Appeal all agreed with him, and so do I.

⁽¹⁾ 12 Ch. D., at p. 578.

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But he thought it immaterial whether the delay was long or short, if it would at some time come to an end. In this the judges of the Court of Appeal differ from him. I think it 50] far the most difficult question *in this cause, but I agree with the judges of Appeal. It is to be observed that the Master of the Rolls gives no answer to his own forcible remark which I have before quoted.

Had the words in the charterparty been "as near thereto as she may get," it would have been open to a charterer to contend that the ship must get as far as it was possible, however dangerous it might be. I do not think it could have been successfully so contended, but those who originally framed this clause prevented the possibility of such a contention by inserting the word "safely." In the absence of authority, and construing the words in their ordinary sense, I think that is the only effect of the introduction of the word "safely." I think if the ship cannot get at all, it cannot get safely. And there is no authority putting any other construction upon the words. It is singular enough, considering how long this has been a common form, that there is not, as far as I can learn, anything said about its construction, either in the text-books, or in any decision in our reports, before *Shield v. Wilkins* ⁽¹⁾, as late as 1850. It would seem that in practice no difficulty had been found in putting a sensible meaning on this clause so as to avoid disputes. Since 1850 there have been a few cases, all of which, I believe, were cited during the argument.

The decision in *Shield v. Wilkins* ⁽¹⁾ had no bearing on this case.

In *Schilizzi v. Derry* ⁽²⁾ the ship under the charterparty was bound to proceed to Galatz or Ibrail, so or near thereto as she may safely get and load a cargo of grain. The ship having arrived at the Sulina mouth of the Danube, which is ninety miles below Galatz, and still farther from Ibrail, the master finding the water on the bar unusually low, so that he could not safely cross the bar till it rose, gave notice that he required the merchant to load his cargo there, a place where it was neither customary nor reasonable to load cargo. The decision as far as regards this point, was that, as Lord Campbell says ⁽³⁾, "the meaning of the charterparty must be that the ship is to get within the ambit of the port, though she may not reach the actual harbor. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles, had completed her voyage to Galatz?"

⁽¹⁾ 5 Ex., 304.

⁽²⁾ 4 E. & B., 878.

⁽³⁾ 4 E. & B., at p. 886

*In *Metcalf v. Britannia Ironworks Company* (¹) it 51 was actually contended that the shipowner, who had contracted that his ship would go to Taganrog, or so near thereto as she could safely get, and there deliver the cargo, was entitled to require the merchant to take delivery at Kertch, 300 miles from Taganrog, and that the ship had completed her voyage because she was obstructed in entering the sea of Azof, but the court, both below and in the Court of Error, agreed with the prior decision in *Schilizzi v. Derry* (²). I think it plain that neither of those decisions touches the present case. Whether the language which Lord Campbell uses is quite the most accurate to express his idea may be doubted, but in the case at bar, it was both reasonable and customary to unload ships in that part of the river to which the Euxine had come and the docks adjoining.

In *Parker v. Winslow* (³) and *Bastifell v. Lloyd* (⁴), where the charterparty was to proceed to a wharf in a tidal harbor (which could not be reached during the neap tides), or as near as she might safely get, it was held that the ship arriving during the low tides the master was bound to wait for the higher tides, on the ground that his contract was to go to the wharf if, in the ordinary course of navigation, it could be reached, and that the shipowner took on himself the risk of delay from the ordinary course of navigation. The delay in the case at bar was not in the ordinary course of navigation.

Hiltston v. Gibson (⁵), in Scotland, and *Capper v. Wallace* (⁶), were cases where the ship could get to her primary destination if she discharged a part of her cargo so as to lighten her. The majority of the Court of Session thought that as the quantity of cargo which the ship would have had to discharge to enable her to lie always afloat at Glasgow was small, it was reasonable to do so, and she was bound to do so. Nothing in that case was decided as to the alternative. The Court of Queen's Bench in the latter case held that whether the ship might insist on the whole cargo being taken at the spot where it was necessary to lighten her as being the nearest to which she could safely get, or was bound to *go farther, depended on whether it was reasonable [52 under all the circumstances to lighten her to the necessary extent,—which they thought was not the case.

These are all the cases which were cited on the argument, and, as far as I know, all the cases which exist, in which

(¹) 2 Q. B. D., 423; 21 Eng. R., 198.

(²) 4 E. & B., 873.

(³) 7 E. & B., 942.

(⁴) 1 H. & C., 888.

(⁵) 8 Sess. Cas., 3d Series, 463.

(⁶) 5 Q. B. D., 163; 29 Eng. R., 246.

anything has been said as to the construction of this clause. And I do not think any of them is an authority for putting a different meaning on the words from that which they would bear in their natural sense, which, I think, is that which I have already expressed.

But the question whether a prevention causing delay for any time however long, but which would terminate, would amount to a prevention within the meaning of the clause is, I think, a much more difficult question. There is no authority bearing directly on the construction of this clause; except *Capper v. Wallace* (¹), and as that case was decided after the decision of the Court of Appeal in the present case, which was binding on the Court of Queen's Bench, and which it appears was cited on the argument, it may be said that it adds no weight to it. But I think that there are decisions so far analogous, that they establish the principle on which the judges of Appeal acted, and which I think they applied rightly.

It is quite true that the words of the contract are "as she may safely get;" and nothing is said expressly about getting without unreasonable delay; but in *Moss v. Smith* (²), Mr. Justice Maule, speaking of what constitutes a total loss of a ship as against an underwriter, after stating that the shipowner must repair the ship if possible, says, "It may be physically possible to repair the ship, but at an enormous cost, and there also the loss would be total; for in matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost." "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." Though the particular case was a policy of insurance, Mr. Justice Maule speaks generally of mercantile contracts. And on [53] this principle it was held in **Geipel v. Smith* (³), by the whole court, and in *Jackson v. Union Marine Insurance Company* (⁴), by a majority in the Common Pleas, and in the same case in error (⁵) by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable

(¹) 5 Q. B. D., 163; 29 Eng. R., 246.

(²) Law Rep., 8 C. P., 572; 6 Eng. R.,

(³) 9 C. B., 94, at p. 108; 19 L. J. 268.

(C.P.), 225.

(⁴) Law Rep., 10 C. P., 125; 11 Eng.

(⁵) Law Rep., 7 Q. B., 404; 2 Eng. R., 290.

R., 98.

to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.

I said in *Geipel v. Smith* (¹), "Very different considerations arise where the cargo is already on board, or, as in *Hadley v. Clarke* (²), is already on the voyage, but while the contract still remains executory, I think time is so far of the essence of the contract, as that matter which arises to cause unavoidable but unreasonable delay, is sufficient excuse for refusing to perform it." I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; he must do something with the cargo. But in this case, the parties have provided for what is to be done with it. If the ship cannot get into dock, she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause which would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation when the cargo is on board. There was a dissenting minority in *Jackson v. Union Marine Insurance Company* (³), and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by Baron Bramwell in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add.

The only remaining question is, whether the evidence in this case is such as to lead your Lordships to concur in the finding of *fact by all the judges in the Court of [54 Appeal that the delay would have been in this case so great as to make it unreasonable to call on the shipowner to wait. The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could do so by waiting an unreasonable time. It is quite true that a question of "reasonable or unreasonable" must always be a question of more or less, and therefore of uncertainty, but that I think cannot be helped. I do not pretend to lay down any precise rule as to what is reasonable or what is not. I think the main elements to be considered are, what would be the effect on the object of the contract ;

(¹) Law Rep., 7 Q. B., 414; 2 Eng. R., 108.

(²) 8 T. R., 259.

(³) Law Rep., 8 C. P., 572, 6 Eng. R., 268; Law Rep., 10 C. P., 125, 11 Eng. R., 290.

and the damage to each party caused by the delay ; and if the result be to lead those who have to decide the question to think (to adopt the language of the Master of the Rolls) that it is absurd to suppose that two commercial men entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable.

In the present case, it was agreed in the written contract that the cargo was to be received as fast as steamer can deliver. And though I do not agree with what is suggested by Lord Justice Cotton⁽¹⁾, that this cast the duty on the merchant of discharging the vessel as quickly as if she had obtained admission to the Surrey Commercial Docks, it certainly showed that both parties knew that a prompt dispatch was of great consequence to the steamer, and, £30 per day being mentioned as demurrage, it was known to each that the loss by a day's delay would be at least that sum, so as to show that a prompt dispatch was to a great extent the object of the contract. It does not appear (at least not as far as I can find) distinctly how long it would have taken to unload the steamer into lighters in the river, nor what it would have cost the merchant, but it does appear that the steamer was willing to go into the Millwall Dock, and there she could have been discharged at the same cost as in the Surrey Dock in about the same time. The defendant refused to assent to this, and I do not think he was bound to assent. He refused because he thought, not that the cargo would be 55] worse, but that the value *of it would be diminished so as make him a loser by about £120. Assuming this to be so, he required the steamer to wait for a period uncertain in its length, but certainly exceeding five weeks ; and five weeks at £30 a day would represent a loss to the shipowner of more than £1,000. I cannot think that reasonable.

The result is that I come to the conclusion that the judgment should be affirmed, and the appeal dismissed with costs.

LORD WATSON : My Lords, this is a case of importance, seeing it involves the construction of a clause which has long been of common occurrence in contracts of affreightment. By a charterparty, dated the 21st of June, 1877, it was *inter alia* agreed that the steamship Euxine, after taking on board a cargo of timber in the Baltic, "being so loaded shall therewith proceeds to London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat, and deliver the same," &c. No lay-days

(1) 12 Ch. D., 597.

proper were stipulated in the charterparty, although it was agreed that there should be ten days on demurrage, "over and above the said laying-days," the apparent inconsistency being due to the fact that the charterparty consists of a printed form, partly filled up in writing. It was provided that the cargo was to be received at the port of discharge "as fast as steamer can deliver," Sundays and legal holidays excepted, and also that it was to be brought to and taken from alongside the ship at merchant's risk and expense.

The Euxine reached the port of London with her cargo in safety; and, on the 4th of August, 1877, having been refused admittance to the Surrey Commercial Docks was moored at the Deptford Buoys, outside the dock entrance.

It appears from evidence led before the Master of the Rolls that the Surrey Dock is used exclusively for the purposes of the timber trade, that in it steam vessels are unloaded at discharging berths alongside the quays, and that the dock authorities do not permit any steamer to enter until there is a vacant berth to receive her. Accordingly they refused to admit the Euxine, not on account of there being no room for her to lie in the dock, but because the discharging berths for steamers were then full and were engaged for some time to come.

*The 5th of August was a Sunday, and the 6th a [56 legal holiday; but on the 7th the shipowners intimated to the charterers that the Euxine was ready to discharge her cargo, and requested that lighters should be sent alongside for that purpose. Upon the 8th of August the charterers refused to take delivery as required, the ground of their refusal being that the Euxine was bound to wait at owner's risk until there was room for her to discharge in the Surrey Commercial Docks. At this time, as appears from the evidence, the dock authorities were unable to specify within what period they could give the Euxine a berth for discharge.

After the refusal of the charterers to accept delivery, the owners landed the cargo by means of lighters, and placed it in the custody of the Surrey Docks Company, and thereafter raised the present action against the charterers for freight, demurrage and other charges and expenses incurred by them in discharging and landing the cargo. The charterer, besides denying liability, preferred a counter-claim of damages for breach of contract.

The Master of the Rolls, on the 23d of May, 1878, gave judgment, dismissing the action, with costs, on the charterer's undertaking to pay the freight and landing charges;

but on the 8th of August, 1879, the Court of Appeal reversed that judgment, and declared "that the voyage of the Euxine ended and the lay-days begun to run from the time when the ship took up her position at the Debtford Buoys, and was ready to deliver cargo." And it was ordered that the freight and what damages they had sustained by reason of the detention of the ship and the delay and increased expense of delivery, be paid to the owners. The present appeal has been brought by the charterers against the judgment and order of the Court of Appeal.

I have made no reference to the communications which passed between the law agents of the parties subsequent to the 8th of August, because these appear to me to have no bearing upon the case as presented to the House. Various questions were argued in the courts below, but the only issue raised between the parties in this appeal is, whether the Euxine on the 7th of August, 1877, had, as was found by the Court of Appeal, completed her voyage in terms of the charterparty.

It is not maintained by the respondents, the owners of the 57] *Euxine, that the vessel had proceeded to the Surrey Commercial Docks. On the contrary, their contention is, that it had become impossible—in the sense of the charterparty—for her to obtain admission to the dock, and consequently that the Euxine must be held to have completed her voyage whenever she reached her moorings at the Debtford Buoys, seeing that she was then as near to the dock as she could safely get and lie afloat. The appellants, on the other hand, contend that by the conditions of the charterparty, the Euxine was bound to proceed to her primary destination, unless prevented by some permanent physical obstacle. They farther maintain that the circumstances which occasioned the exclusion of the Euxine did not constitute an obstacle either of a physical or of a permanent character, and that the vessel was therefore bound to wait, at owner's risk, until the obstruction was removed, and then to enter the dock for the purpose of discharge.

Both parties seemed to concede, and I think it may be taken as settled law, that when, by the terms of a charterparty, a loaded ship is destined to a particular dock, or as near thereto as she may safely get, the first of these alternatives constitutes a primary obligation; and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become in some sense "impossible" to do so. It is only in the case of her entrance into the dock being barred by such "impossibility" that the

owners can require the charterers to take delivery of her cargo to a place outside the dock. When a vessel in the course of her voyage is stopped, by an impediment occurring at a distance from the primary place of discharge, it has been decided that she cannot be held to have got "as near thereunto as she could safely get," and therefore cannot claim to have completed the voyage in terms of the second alternative: *Schilizzi v. Derry* ('), also *Metcalf v. Britannia Ironworks Company* ('). It was observed by Lord Chief Justice Campbell in *Schilizzi v. Derry* ('), that the meaning of these words in the charterparty "so near the port of landing as the ship may safely get," "must be that she should get within the ambit of the port, though she may not be able to enter it." In the present case it does not admit of dispute that the *Euxine* *when lying at [58 the Debtford Buoys was as near to the Surrey Commercial Docks as she could safely get, if it be assumed that it had become within the meaning of the charterparty impossible for her to get into the dock.

The appellants maintained that there can be no impossibility within the meaning of the contract unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, in any fair construction of the charterparty, it is necessary that the obstruction should be of a purely physical character; and I also doubt whether there be any foundation in fact for the appellants' contention. The exclusion of the *Euxine* from the Surrey Docks in August, 1877, was owing to a rule made by the statutory authorities intrusted with the administration and control of the dock. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am of opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel or to her being turned summarily out of the dock if she did get into it, does in reality constitute a physical obstacle.

The controversy between the parties appears to me, accordingly, to be narrowed to this issue,—whether the obstacle which the *Euxine* encountered was of such permanency as to render it impossible, within the meaning of the charterparty, for her to get into the Surrey Commercial Docks.

In providing alternative destinations, the charterparty does not express the condition upon which the second alternative becomes substituted for the first. It does not in terms ex-

(') 4 E. & B., 878.

(*) 2 Q. B. D., 423; 21 Eng. R., 198.

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press any distinction between the alternatives, and that the first is to be regarded as the primary destination to which the chartered vessel must, if possible, proceed, is, I apprehend, an inference based upon what is known to be the ordinary course of shipping business, and, on the presumption that both parties would, from considerations of mutual interest, have agreed to that effect if they had made it matter of express contract.

The question now before the House must also, in my opinion, be determined by some such reasonable considerations. A permanent obstacle can in no reasonable sense be held to 59] mean an *obstacle which will remain forever. There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond which a continuing obstacle ceases to be temporary. It may be very difficult to fix that limit, which will obviously vary with the circumstances of each case and the terms of the charterparty; but I do not think the same difficulty exists in regard to the principle upon which it ought to be determined. I have always understood that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

My Lords, I am of opinion that the question at issue in the present appeal must be solved in that way, and that the *Euxine* cannot be held to have completed her voyage on the 7th of August, unless it be established that the delay which would have taken place before she was admitted to the Surrey Docks would have been so great that the parties,

had they anticipated and provided against its occurrence on the 21st of June, 1877, would not, as reasonable men of business, have arranged that the vessel should wait outside the dock at owner's risk until a berth was ready for her. I adopt the view of Lord Justice Brett (*) that the shipowner must bring his ship to the primary destination named in the charterparty, "unless he is prevented from getting [60] his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable."

None of the authorities cited in the course of the argument, with the exception of two which I shall shortly notice, appears to me to have any material bearing upon the question before the House.

Most of these authorities related to the question whether, had she been permitted to enter the dock, the *Euxine* would have completed her voyage, and would have been at the charterer's risk as soon as she was moored there, or not until she reached a discharging berth alongside the quay. There being no proper lay-days stipulated in her charterparty, it might in that event have been plausibly contended that the *Euxine* fell within the principle of decision in *Burmester v. Hodgson* (*), and not within the rule established in *Randall v. Lynch* (*). But it does not appear to me to be necessary to decide the point, because the *Euxine* never did get into dock; and I do not think that its decision one way or another would be of any assistance in determining whether it was impossible for her to get there.

The cases of *Parker v. Winlow* (*) and *Bastifell v. Lloyd* (*) come somewhat nearer to the present, although their bearing upon it is not very direct. It was there held that the shipowner, having contracted in the knowledge, or at least with the means of knowing, that the primary place of discharge specified in the charterparty was a tidal port, was bound to take the risk of the tides being unfavorable when his vessel arrived, and to complete the voyage by proceeding to that place at spring-tides. It appears to me to be a reasonable inference from these decisions that no impediment arising in the ordinary course of navigation to a particular port or dock, or arising in the usual and ordinary course of management of a particular port or dock, and not

(*) 12 Ch. D., at p. 598.

(*) 2 Camp., 488.

(*) 2 Camp., 352.

(*) 7 E. & B., 942.

(*) 1 H. & C., 388.

lasting beyond ten days or a fortnight, is to be regarded as 61] a permanent obstruction, *but that the ship must wait and proceed to its primary destination before the charterer can be required to take delivery of the cargo. But I do not think that much aid can be derived from these decisions in determining what shall be held to constitute a permanent obstacle in a case like the present.

In *Geipel v. Smith* (*), and *Jackson v. Union Marine Insurance Company* (*), certain points were decided in regard to the effect of unreasonable delay arising from causes not imputable to any of the parties, and so far, these cases appear to me to have a very close analogy to the present. In each of these cases there had been an impediment in the way of the chartered vessel, in consequence of which she did not go to her port of loading. That impediment, which arose in the first case from a blockade, and in the second from shipwreck, was temporary in this sense, that it would have been quite possible for the one vessel to have proceeded to the place of loading after the blockade was raised, and for the other after her repairs were completed. In *Geipel v. Smith* (*) the charterer raised an action of damages for breach of contract against the shipowner; but the Court of Queen's Bench, being satisfied of the fact that the ship could not have reached her destination within a reasonable time without running the blockade, held in law that the contract of the charterparty was thereby discharged. In *Jackson v. Union Marine Insurance Company* (*) the shipowner preferred a claim for lost freight against the underwriters, who resisted it on the ground that the charterparty remained in force notwithstanding the mishap which had befallen the ship, and that the plaintiff was entitled to demand either specific implement or damages from the charterer. At the trial of the cause, the jury, in answer to questions put to them by the presiding judge, found that the time necessary for repairing the ship, so as to make her a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed on cargo at the end of such time; and also that the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the charterers. A verdict was entered for the defendants, leave being reserved to plaintiff; and the case was 62] thereafter argued on a rule before the Court of *Common Pleas, under an agreement that the defendants should be at liberty to argue that the findings of the jury were

(*) Law Rep., 7 Q. B., 404; 2 Eng. R., 98.

(*) Law Rep., 8 C. P., 572, 6 Eng. R., 268; Law Rep., 10 C. P., 125, 11 Eng. R., 290.

against the weight of evidence. The majority of the Common Pleas took substantially the same view of the facts as the jury had done, and held that the delay occasioned by the getting off and repair of the ship was so unreasonable as to terminate the adventure, and that the plaintiff was accordingly entitled to recover under his policy on freight. And, upon appeal, the Court of Exchequer Chamber, with a single dissentient voice, affirmed the judgment. It was precisely the same question which arose for decision in these two cases; and, if I understand them aright, it was in both decided that this delay in loading a cargo would have been so unreasonable, so inconsistent with the presumable views and intentions of both the contracting parties, that the charterparty could no longer be held binding on either of them. No doubt in these cases the contract had not passed the executory stage; but seeing that unreasonable delay in reaching the place of loading, when occasioned by no fault of either of the parties, is effectual to discharge such a contract altogether; I conceive that, *a fortiori*, a similar delay in reaching the primary place of discharge ought to have the effect of enabling the vessel to complete her voyage by proceeding to the alternative destination.

That leaves only the question of fact, whether the state of the Surrey Commercial Docks, in August, 1877, was such as would have unreasonably delayed the discharge of the Euxine within that dock. Had I been called upon to decide that question in the first instance, I should have had great difficulty in coming to any conclusion satisfactory to my own mind. I agree that the question is sufficiently raised by the pleadings, and that it was in view of the parties, and was actually discussed in the course of the argument, which is interwoven with the evidence in this case, although it is not noticed in the judgment of the Master of the Rolls. But I cannot resist the impression that, in their anxiety to prove or disprove the alleged custom of the port, which has now been eliminated from the case, the parties have omitted to direct their evidence to many points upon which it would have been, in my opinion, desirable that a judge, unacquainted with the port of London, should receive information. In the absence *of such informa- [63
tion, I have done my best to sift the evidence, and the result is that I am not disposed to differ from the Court of Appeal. I think it may be taken as proved, that the block occasioned by the great demand for steamship berthage in August and September, 1877, although that was rapidly becoming the normal condition of the Surrey Docks in the preceding

months of June and July, was due not to ordinary but to exceptional causes. And seeing that, on the 4th of August, the authorities could not undertake, within a month, or any other given time, to admit the Euxine into the dock, and that even on the 23d of August they were not in a position to give a more definite or satisfactory undertaking, it appears to me to be safe to conclude that the length of time for which the Euxine must have waited in the port of London, in order to discharge in the Surrey Docks, would have been in excess of any delay which either the shipowner or the charterer, at the time of entering into the charterparty, could reasonably have contemplated.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

THE LORD CHANCELLOR (Lord Selborne): My Lords, having had an opportunity of seeing in print the opinions which have just been delivered by my two noble and learned friends who have addressed the House, and entirely agreeing with them, I think it unnecessary to add anything more.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 13th January, 1881.

Solicitors for appellant: *Plews, Irvine & Hodges.*

Solicitors for respondent: *Druce, Sons & Jackson.*

See 33 Eng. R., 841 note.

[6 Appeal Cases, 64.]

H.L. (Sc.), Jan. 13, 1881.

[HOUSE OF LORDS.]

64] *CASSELS, Appellant; STEWART, Respondent (').

Partnership—Assignment by one Partner of his whole Interest to another.

A prosperous company came to consist of three partners, A., B., and C., having equal shares. The contract of copartnership contained, *inter alia*, a clause that it should not be in the power of any of the partners to assign all or any part of their shares or interest in the capital stock, or profits of the concern to any person or persons, or give them a right to inspect the company's books, or to interfere in any way with the business; and should any such assignment be granted the same was declared of no effect so far as regards the company. There was also a clause that on the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. A. entered into an agreement by which he sold to B. his whole interest. A.'s name remained on the books, and he signed all deeds relating to the business till his death seven years after. C. was not till then informed of the agreement. He then claimed to partici-

(') Affirming Court of Session Cases, 4th Series, vol. 6, p. 936.

pate on the grounds of (1) an alleged mandate to B. to purchase for the company A.'s interest; (2) that the agreement could only be legally made under the contract of copartnership with his consent; and (3) that B. had secretly acquired a benefit for himself within the scope of the partnership business:

Held, affirming the decision of the court below, that in point of fact no agreement had been made between B. and C. to the effect that B. was to buy A.'s interest for the partnership. And in respect to the articles of copartnership, they did not prevent the agreement being made, and otherwise it was perfectly legal. Therefore C. was not entitled to any benefit under it.

APPEAL against a decision of the Second Division of the Court of Session.

In 1845 the Glasgow Iron Company was constituted by contract of copartnership to endure for seven years, with a break at the end of five in favor of any of the partners. The second article, *inter alia*, provided that "it shall not be in the power of any of the partners to assign all or any part of his share or interest in the capital, stock, or profits of the concern to any person or persons, or to give them a right to inspect the company's books, or to interfere in any way with the business of the company; and *should any [65 such assignation or other conveyance be granted or right given contrary to this stipulation, the same is hereby declared to be null and void, and of no force, strength, or effect, so far as regards the company or other individual partners, who shall not be obliged to pay any attention thereto."

The seventh article was as follows:—"And in like manner in the event of any of the partners retiring from the concern as hereinbefore provided or becoming insolvent, the remaining or solvent partners or partner shall have power to assume such other person or persons into the room and place of such retiring or insolvent partner or partners, and the remaining or solvent partner and partners shall nevertheless have the same option of retaining the company's stock, debts, property, assets, and effects, upon granting bills to the retiring partner or partners, or to wind up the concern in manner, and subject to the same conditions, terms, and declarations as is provided in the case of a deceasing partner."

The original partners were the late James Reid, James Reid Stewart, his nephew and respondent, Robert Cassels, the appellant, and Noah Meese.

In 1847 James Henderson Robertson was assumed as a partner by minute of agreement.

In 1850 Noah Meese retired, and his interest was taken over by the company and divided between the remaining partners.

In 1852 the appellant acquired one of Mr. Reid's shares by an arrangement ratified by the company by minute dated 1858.

In 1860 Mr. Robertson retired as at the 31st of May, 1859, and his interest was taken over by the three surviving partners, in terms of article 7 of the contract of partnership. The interest of the different partners in the concern had been altered from time to time. On the occasion of Mr. Robertson's retirement a minute of agreement was prepared, dated the 31st of May, 1860, but not signed till March, 1864, that the three remaining partners, Reid, Stewart, and Cassels, should each have an equal share in the company's business from the date of Mr. Robertson's retirement.

The circumstances out of which this action arose are as follows:—On the 19th of May, 1863, a private agreement was executed between Reid and Stewart, whereby, on the [66] terms and conditions *therein specified, Reid agreed to sell and sold to the respondent his whole right and interest in the company as the said right and interest stood on the 31st of May, 1859. By the 1st article the price was fixed at £62,400, being the amount standing at Reid's credit in the books of the concern as at the date the 31st of May, 1859, to be paid with interest within twenty years from the date of the agreement. By the 2d article the respondent was to be entitled to the whole profits that had accrued upon Reid's right and interest in the concern from the 31st of May, 1859, and that might accrue thereafter on the same. By the 3d and 4th articles it was provided that the interest of the price from May, 1859, to March, 1863, amounting to £13,993 2s. 9d., should be paid to Reid at that term, and that the interest after that term, at the rate of 4 per cent., should be paid to him half-yearly. The 7th article was in the following terms:—"The right and interest or stock hereby sold may remain in the first party's (Reid's) name, or it may be transferred over to the second party at any time he may require it."

Mr. Reid's name remained on the books of the company down to his death in 1870, and he continued as before to be a party to deeds and various other transactions relating to the partnership. The firm was very prosperous, and had assumed, previous to 1870, very large proportions.

The agreement was not intimated to the appellant, but after Reid's death it came to his knowledge; and he ultimately raised this action, concluding for declarator that the agreement dated the 19th of May, 1863, entered into by the respondent with the deceased James Reid, for the purchase

of the said James Reid's whole right and interest, as at the 31st of May, 1859, in the company's concern carried on in Glasgow under the name of the Glasgow Iron Company, was made and entered into by the respondent for and on behalf of the said Glasgow Iron Company, and the appellant and respondent as the whole remaining partners thereof, or must be held to have been so made and entered into; and further that the partnership accounts of the company from the 31st of May, 1859, to the 31st of May, 1870, should be made up and settled on the footing that the said purchase was made for behoof of the said company, and the appellant and respondent *equally as the whole remanent [67 partners thereof. The material averments of the appellant were as follows:

(Cond. 11.) The negotiations with Mr. Robertson, which ended in his retiral, were conducted by the pursuer (appellant). Although ratifying what had been agreed to by the pursuer, Mr. Reid objected to the terms granted to Mr. Robertson as being too favorable to him. The defender (respondent) subsequently reported to the pursuer that Mr. Reid was willing to make over his interest in the business to the company on similar terms, and he was thereupon authorized by the pursuer to negotiate for a purchase of Mr. Reid's interest in the business for the company on these terms. Nothing further was heard by the pursuer about the matter till after Mr. Reid's death in 1870, when the pursuer discovered that the defender had purchased Mr. Reid's interest in his own name on lower terms than those which the pursuer empowered him to give on behalf of the company.

(Cond. 12.) By the said agreement Mr. Reid transferred his share in the said company to the defender. It made the partners two, in place of three. It in reality gave the defender the practical control of the business by means of his command of Mr. Reid's vote. It deprived the pursuer of Mr. Reid's advice as a party interested in the same way as before in the business. It prevented him exercising the right of purchase of Mr. Reid's share, which he had in the event of Mr. Reid's death under the then existing terms of the copartnery.

(Cond. 13.) The defender did not ask the pursuer's consent to said purchase, nor after it was made did he communicate the same to the pursuer as he was bound to do. On the contrary, for the defender's own purposes and to the pursuer's prejudice, and with the object of deceiving the

pursuer, he continued with the late Mr. Reid fraudulently to conceal the transaction from the pursuer, and to lead him to believe that Mr. Reid continued to be a partner and to be in the same position as before in all respects.

(Cond. 14.) In pursuance of said fraudulent schemes, and without any communication being made to the pursuer as to the said purchase, and subsequent to the agreement in 1863, the following devices for concealing the true state of matters were resorted to by the defender: The defender and Mr. Reid still signed along with the pursuer deeds necessary for carrying out purchases, leases, and various other transactions entered into in name of the said firm from time to time. These conveyances, leases, and other deeds were, with the knowledge and approval of the defender and Mr. Reid, taken in favor of Mr. Reid, the pursuer, and defender, as partners of the said firm, in similar terms to those in which they were taken prior to 1863. The pursuer had always great difficulty in getting the balance-sheets of the company signed, and they often lay over for a long time subsequent to their date. On the 19th of May, 1863, the balance-sheet of the 31st of May, 1859, had not been signed. In March, 1864, it was signed by Mr. Reid, the defender, and pursuer. At the same time the balance-sheets as at the 31st of May, 1860, 1861, 1862, and 1863, were signed, and also the minute dated the 31st of May, 1860, which in part relates to Mr. Robertson's retiral. The balance-sheet at the 31st of May, 1864, was signed by Mr. Reid, the defender, and the pursuer in December, 1866. The dockets to these balance-sheets were all in the following or similar terms, viz.: We, the undersigned remaining partners of the Glasgow Ironworks Company, hereby agree that the above balance represents a correct statement of the company's affairs and our *respective interests at the above date, signed James Reid, James R. Stewart, Robt. Cassels." No subsequent balances have been signed. They have from time to time been made up by the pursuer. Those till 1870 were made up on the footing that Mr. Reid continued a partner as before, and they were sent to the defender and to Mr. Reid up till the time of his death. By these and other fraudulent misrepresentations and concealments the pursuer was induced to believe, and did believe, that Mr. Reid remained a partner of the said firm up to the date of his death on the same terms as before, and that there had been no change in the position of the other partners and himself.

The pleas in law for the appellant were:

(1.) The pursuer is entitled to decree as concluded for—
(1.) In respect the defender agreed with the pursuer to endeavor to purchase Mr. Reid's interest on behalf of the Glasgow Iron Company, and thereafter succeeded in purchasing the same. (2.) In respect the defender, as a partner of the said company, was not entitled to purchase, without the pursuer's consent, Mr. Reid's interest for himself, or otherwise than on behalf of the said company.

The respondent alleged that the agreement was part of his uncle's testamentary arrangements, and there was no doubt an immediate benefit was by the agreement conferred on the respondent, because at its date there was a sum of accrued profits of at least £25,000 at the credit of Reid over and above the price of £62,000.

He stated in his answers, *inter alia*, as follows:

(Ans. 12.) Explain that the agreement did not and was not intended to affect Mr. Reid's position as a partner of the company, or the rights and obligations existing, as between him on the one hand and the pursuer on the other. In point of fact, Mr. Reid continued a partner till his death and took as much interest in the concern after the date of the agreement as before.

(Ans. 13.) Admitted that the defender did not ask the pursuer's consent to the said agreement, nor did he communicate the same to the pursuer. Explained that the defender was Mr. Reid's only nephew, and that the agreement was prepared without his solicitation and knowledge by the late Mr. Towers-Clark, Mr. Reid's agent, in connection with Mr. Reid's testamentary arrangements, and was submitted in draft to the defender, who accepted and executed it in conformity with his uncle's wishes.

His pleas in law were:

(2.) The averments of the pursuer being, so far as material, unfounded in fact, the defender is entitled to absolvitor.

(3.) The agreement in question having been lawfully entered into by the defender for his own behoof, the pursuer has no interest in or right to claim the benefit of the same.

The Lord Ordinary ('), 27th of November, 1878, pronounced *an interlocutor by which he sustained the defences; and assoilzied the defender from the whole conclusions of the action.

(¹) Lord Curriehill.

The appellant reclaimed ; but the Second Division, 22d of May, 1879, adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note⁽¹⁾.

On appeal,

Sir F. Herschell, S.G., *J. B. Balfour*, S.G. [Scotland] (with them *Mr. Rigby*), contended for the appellant that he had authorized the respondent in 1859, and that the respondent had accepted of the authority to negotiate for the purchase of Reid's share for the joint behoof of the remaining partners, and therefore he must be held to have purchased it for the purposes of that mandate ; and, at all events, the fact of the agreement referring back to that year was suspicious. But if held that there was no mandate, then, secondly, the agreement was entered into under such circumstances as to entitle the appellant to participate in it. For it could not be legally entered into without the appellant's consent. The contract of copartnership contained an absolute prohibition against partners assigning their interest ; and the acquisition of shares of outgoing partners, as shown by documents and previous acting of the company, was one of the objects of the company. Apart from the express terms of the contract, the secret agreement by which the respondent acquired for himself alone a benefit falling within the scope of the partnership business, was a breach of the good faith of the partnership, and when such a benefit was acquired each partner had a right to demand that it should be communicated to the whole of them equally. This was not a case of sub-partnership, for Reid ceased to have the slightest personal right or interest, and became at best a mere trustee bound to follow the respondent's instructions. And the illegality of such an arrangement was demonstrated by the fact that, the appellant believing Reid still in the business, was induced to carry it on in that belief, and, consequently, for the benefit of two-thirds to the respondent. Past profits might be assigned ; but here every right, benefit, and interest of every kind was given up, and the company was deprived of that which the contract of copartnership 70] *made essential—Reid's personal interest, utmost skill, and attention.

On general principles it was inequitable, having regard to the fiduciary relations due to each other, that such an agreement should be made behind the back of another partner. If the appellant had been informed in 1863 of the agreement he would have claimed half the benefit, or else—the term of

(1) Court of Sess. Cas., 4th Series, vol. vi, p. 936.

the copartnership having expired—would have dissolved the partnership, and started another business. He could not be prejudiced by the relationship between Reid and the respondent, and the deed in its terms did not seem to confer a special favor, and was not a testamentary arrangement, but an *inter vivos de presenti* contract of sale.

The appropriate remedy now was that the agreement should be held to be good only in the way that it could legally be made, and that was by giving the appellant a benefit in it.

[They cited *Featherstonhaugh v. Fenwick* ('); *Bluck v. Capstick* ('); *Carter v. Horne* (').]

Mr. *E. E. Kay*, Q.C., and Mr. *Mackintosh* (of the Scotch bar), appeared for the respondent, but were not called upon.

The Law Peers delivered judgment as follows:

LORD SELBORNE, L.C.: This case has been argued with much ability, and your Lordships have been put in possession of the views which are relied upon in support of the appeal. Those views were not adopted by any of the four learned judges who decided the case in the court below; and under these circumstances, as I believe there is no difference of opinion among your Lordships with regard to the correctness of the decision appealed from, it does not appear to be necessary to call upon the learned counsel for the respondent to address your Lordships' House.

Now, the first point, which was very confidently urged, was that in point of fact there was a mandate constituting the respondent, *Mr. Stewart, the agent of his copartner, the appellant, in this transaction, so as, upon the principles of mandate or agency, to entitle the appellant to the benefit of the contract made between Mr. Stewart and his uncle Mr. Reid. It would be very difficult to imagine an allegation of that kind resting upon more slender grounds, because the way in which it is put by the appellant himself is this: that in the year 1860, three years before the agreement between Mr. Reid and Mr. Stewart, upon the occasion of Mr. Robertson parting with his interest on certain terms which were thought to be beneficial to him, something was said about Mr. Reid being probably willing to part with his interest on similar terms, and Mr. Cassels, the appellant, said that he would be perfectly agreeable to such an arrangement. Upon the question of fact, whether any conversation which could reasonably be so interpreted ever took place or not, there is a difference of recollection between the appel-

(') 17 Ves., 298.

(') 12 Ch. D., 863.

(') 1 Eq. C. Ab., 7.

lant and the respondent. Your Lordships have one witness against the other, and nothing that I can see to strike the balance between them. Therefore there would have been great difficulty, to say the least, in acting upon that evidence, more especially when the language to which alone Mr. Cassels speaks is itself the most vague and uncertain which could well be conceived on such a subject. That Mr. Stewart did not consider that he had accepted any mandate for that purpose is clear.

But it seems to me that we may lay the whole of that branch of the argument aside upon this ground: that whatever controversy might have arisen in consequence of that conversation between these parties, assuming the conversation to have taken place as Mr. Cassels states, if then or shortly afterwards such an agreement had been made, in point of fact no such agreement was made then or within anything which by possibility could be called a reasonable time afterwards. There is no connection in point of fact between the actual agreement and that conversation. I pass, therefore, from the subject of mandate.

The next argument was this, that a wrong has been done here by the purchase of Mr. Reid's share from him by his nephew, Mr. Stewart, on all or some of these three grounds: first, that there is in the partnership contract a prohibition [72] against the *assignment of a partner's share, and that the breach of that prohibition, which it is said has taken place by this transaction, is a wrong for which there must be some remedy; secondly, that even if that were no wrong, or a wrong not drawing after it the remedy now claimed in the case of a sale of Mr. Reid's interest to a stranger, yet the position of Mr. Stewart, as a partner, disqualified him at all events from purchasing otherwise than for the benefit of his copartner as well as himself, and that on that ground the appellant may claim the benefit of the purchase; and, thirdly, that if these consequences would not follow from these causes alone, they do follow when you have added the concealment of the transaction for a considerable period of time.

Now, the first observation that I have to make is this, that I cannot interpret the partnership contract as prohibiting, or attempting to prohibit, a sale of the beneficial interest of one of the partners to a stranger, or to a copartner, if the effect of such sale is not to give any "right to inspect the company's books" or "to interfere in any way with the business of the company," to a person who had it not before, or to oblige the company or other individual part-

ners to take notice of it or "pay any attention" to it. I cannot separate, as it has been suggested that your Lordships ought to separate, that part of the clause which speaks of the effect of such assignation or conveyance, if granted, and the part which says that it shall not be in the power of any of the parties to assign. Your Lordships will observe that this is not a covenant not to do a thing, but a declaration as between the partners that it shall not be in the power of any of them to do it. Then it goes on to contemplate an act of that nature being done, and says, that if it should be done, it shall be "null and void and of no force, strength or effect so far as regards the company," and so on. The argument on the other side really is, that you are to turn the declaration as to what is not to be in the power of the partners into a covenant not to do a thing which is in their power; and when it is expressly said that the effect of a particular act is to be qualified so far as relates to certain persons and matters, that you are to qualify it still further, and not only so far. I cannot accept that construction of the agreement. It appears to me that its intention and effect is simply this: if anything of that kind is *done, it shall not have the effect of giving any per- [73 son claiming under it any right whatever against the company or against the other partners, or of obliging them to take any notice of it; it shall not have any effect which will alter any of their rights. The actual transaction was one which, as it was carried into effect, was, as I think, in exact conformity with that agreement. It gave no new person any right to inspect the company's books, or to interfere with the business; it did not enlarge the power of interference, within the meaning which I ascribe to those words in the contract, of any person, beyond what existed before; it did not change the constitution of the partnership; it did not make Mr. Reid cease to be liable; it did not oblige the appellant to take notice of any greater interest in Mr. Stewart than Mr. Stewart had before.

I pass on to the next argument, arising out of the special position of Mr. Stewart as a partner. Upon that I say, whatever may be the force of that argument, it cannot depend upon this clause; for this clause most certainly makes no distinction between an assignment to a person who is, and an assignment to a person who is not, a partner. On the contrary, it would rather seem to me that it has in view an assignment to one who is not a partner, prohibiting things which in the other case could not happen. Well, then, is there any authority which says that the beneficial interest

of one partner in a partnership, apart from a special contract or stipulation, may not be given or sold by him to another of the copartners? The authorities which were cited have no tendency to establish such a principle. They relate to dealings by a partner, during the continuance of the partnership, with either present or future partnership assets or liabilities. A man obtaining his *locus standi*, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his copartners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them. I should be sorry to see the day when the principle of such cases as *Featherstonehaugh v. Fenwick* ⁽¹⁾ could be disturbed or called in question. But this subject-matter here is in no sense a property or interest of the partnership. 74] The share of an individual *partner is his own property, not the property of the firm; and if bought it would not be bought by the partnership as a partnership, but by one or more individuals purchasing for his or their own benefit. If the man dies, it passes to his heirs and executors, unless there is a stipulation to the contrary. If there is a stipulation to the contrary, still the principle is the same in all respects—it is his property—it is something distinct from the partnership assets, although it is, or represents, his interest in those assets. That principle, therefore, does not touch this case at all.

It is suggested that by possibility the motives of particular partners for interesting themselves in the welfare of the concern may be affected by a diminution of their beneficial interests. All I can say is, if that be the opinion of those who enter into a partnership contract, they must put something into the partnership contract to restrict the powers which otherwise each partner would have over what is his own. I am not at all sure that it would increase the inducement to enter into partnership contracts if such restrictions were made part of them; because the principle of the argument does not stop at the point where the entire beneficial interest is parted with, and a partner becomes a mere trustee for some one else to whom he has made either a gift or a sale; it would apply to every case in which he diminished his beneficial interest below the point recognized in the constitution of the partnership, either by communicating to somebody else a particular share of it, or by allowing some participation in the profits, for a certain consideration, to

(1) 17 Ves., 298.

another person, or by making a charge upon it, or by granting or agreeing to pay an annuity or annuities out of it.

Not only is there no authority for such a proposition, but we have in the books well-known cases in which such transactions have been recognized by courts of equity, at least in England, as regular and legitimate, where not expressly excluded. There is the well known case of *Brown v. De Tastet*⁽¹⁾. De Tastet and Paiva and Grellet entered into a partnership deed, and a Mr. Mangin, who had been at an earlier period in partnership with De Tastet, not communicating at all with Paiva or Grellet, made *an agreement for a sub- [75 partnership with De Tastet in De Tastet's share. Afterwards the accounts, as to that share, had to be taken in a suit in chancery, and the court, with the approval of Lord Eldon, as appears by this book, dismissed the bill as against the other two partners Paiva and Grellet, because they had nothing to do with the contract; but directed an account of the profits as between De Tastet and Mangin, holding De Tastet responsible to Mangin for his share of all the profits which had been made either by himself or the other partners. There is another case upon the same principle, *Bray v. Fromont*⁽²⁾. The agreement there was between three persons to work a coach from London to Bath, each undertaking to find horses for certain stages. One of them (Smith) employed Bray to provide horses for him, and agreed, in consideration of his doing so, to give him a certain share of his profits. The bill which was maintained was for an account and payment of a proportionate share of those profits, but subject to the account as between the partners in the principal partnership; the other partners having nothing to do with that share in which the interest was given to Bray.

I apprehend, my Lords, that you will, under these circumstances, hold that in this case there is no principle which justifies any claim on the part of the appellant to participate in the profits of this transaction. I can find no ground for saying that there is any breach of the duty of a partner in a transaction like this between an uncle and a nephew, by way of bounty to a very great extent on the part of the uncle to the nephew; a transaction involving no object or purpose against the good faith of the partnership agreement, and neither alleged nor proved to have had such an effect. If that or any other bargain, made by a partner with another partner, being concealed, were used for unfair or illegitimate purposes in the subsequent management of the partnership concern, and if, when the facts became known, it should ap-

(1) Jac. Rep., 283.

(2) 6 Madd. Rep., 5.

pear that wrong had been done and damage sustained by means of any such secret arrangement between two partners, redress suitable to the nature of the injury and the circumstances of the case, might probably be found. But that would depend, not upon the agreement by one partner to 76] give a beneficial interest in *his share to another, but upon the use assumed to have been made of that agreement in an illegitimate way to the prejudice of a third partner, and upon proof of actual damage having occurred.

It appears to me to be unnecessary to add anything more, except to move your Lordships that this appeal should be dismissed with costs.

LORD PENZANCE: My Lords, agreeing as I do with all that has fallen from my noble and learned friend the Lord Chancellor, I shall occupy your Lordships for a very few minutes with what I have to say.

With regard to the first point as to the mandate, I think it is a point which, when the facts of the case are understood, is really hardly arguable. The most that has happened, supposing that you take the pursuer's account and throw aside the account of the defender altogether, is that at a certain time it was intimated to the pursuer that Mr. Reid wished to retire upon the same terms as Mr. Robertson, and thereupon the pursuer said that he would have no objection to that arrangement. Now, my Lords, that is construed into a mandate, and then the matter is followed up by an attempt to show that the bargain which was ultimately made between Mr. Stewart and Mr. Reid was a bargain actually made in furtherance and under the authority of that mandate.

It seems to me that the fact that the one partner intimated to the other partner that he was ready to enter into a certain arrangement with regard to the retirement of Mr. Reid, is not sufficient to constitute an authority in the sense in which that word is used in this argument without showing that Mr. Stewart, to whom that proposition was made, accepted it as an authority, and afterwards acted upon it as an authority. Now it seems to me that there is no particle of evidence upon the face of the pursuer's statement to show that Mr. Stewart ever accepted that, or ever professed that he would act upon it, and it took place three years, if not more, before he actually entered into a contract with Mr. Reid for his retirement, or rather for the sale of his interest in the concern. It appears to me, therefore, that that point en- 77] tirely fails, and that *it is one upon which your Lordships could have, I think, very little or no doubt.

With regard to the deed, and particularly the effect of the sixth clause of the deed, I will not add one word to the excellent exposition of it which my noble and learned friend the Lord Chancellor has given, and with which I entirely agree.

But with regard to the last point, which is a more substantial one, and one upon which greater stress was laid, namely, that the principle that a partner (and it is the same with regard to an agent) cannot in acting in partnership concerns secure to himself an individual benefit where he is acting in those concerns, and that if he attempts to do so, the partnership may claim a benefit in any such contract, is a principle well understood and thoroughly and soundly established; and, as I said before, the same principle applies in the case of an agent. But the answer to the proposed application of that principle to the present case is, that this arrangement with Mr. Reid was not an arrangement in the partnership business, it was not an arrangement in which the partnership had an interest. I do not know that I could better express what I feel upon that subject than by reading a sentence of the judgment of the Lord Ordinary. He says, "The present case appears to me to be entirely different. The subject-matter of the agreement is entirely outside the scope of the company's business. It relates exclusively to the stock and profit belonging to one of the individual partners, who is communicating these on extremely liberal terms to his own nephew, who no doubt happens to be also a partner in the concern, but who does not thereby acquire any advantage over the company, or the remaining partner, or make any profit which the company or the remaining partner would have made if there had been no such agreement." It seems to me, my Lords, that that correctly describes the circumstances of the present case, and by that description throws them outside the principle upon which your Lordships are now asked to act.

But then it was said that although that may be so, a distinct wrong was done in the present case to Mr. Cassels, the pursuer, because by an assignment of Mr. Reid's interest behind his back, Mr. Reid had stripped himself of part, at any rate, if not of the *whole, of those motives which [78 would tend to make him exercise the vigilance and judgment in the partnership affairs to which Mr. Cassels, the pursuer, had a right to look. My Lords, I confess that when that proposition was stated, I asked myself how far such a proposition would go. A share in a partnership and the profits made, or to be made, in the partnership, are, I

believe, the property of the individual partner, and if the principle were once to be established that an individual partner cannot charge and cannot sell a portion of his interest, that he cannot hand over to a third person for valuable consideration a year's profit, or half a year's profit, or in any way diminish or withdraw a portion of the active interest he has in the concern,—I say if that principle were to be established it would be one of very wide application, and one which would largely diminish the individual interest and freedom that properly belong to a partner in any partnership. I looked anxiously to see whether, for such a principle as was put forward, any case was cited at the bar in establishment of it. No such case, or authority of any kind, was cited, and the principle of the cases I have referred to certainly did not embrace it. My Lords, in the absence of all authority, and having regard to the effect which would be produced by accepting such a principle, I should strongly advise your Lordships that you ought not to do so.

Under these circumstances I agree that the judgment should stand, and that the appeal should be dismissed, with costs.

LORD BLACKBURN: I am entirely of the same opinion.

On the first question, whether there was in point of fact a mandate or authority given by Mr. Cassels to Mr. Stewart under which Mr. Stewart made a contract with Mr. Reid, it is only a question of fact, and upon that I intend to say nothing more than that having read Lord Curriehill's (the Lord Ordinary) note to his interlocutor, which is the first judgment given, I can add nothing whatever to his reasons stated there, which seem to me to place that part of the matter in as clear a light as possible. I do not think there is the slightest ground for saying that in point of fact that was made out.

Then as to the next ground upon which the appellant's 79] case *was put, namely, the supposition of an analogy to the case of *Featherstonehaugh v. Fenwick* (1) and other cases of that sort, I do not think that that class of cases has any analogy with the present. Those cases proceed upon the ground that a partner being an agent (for I think it is because he is an agent that the fiduciary character arises), if he, as an agent, makes a profit out of the concerns of his principal, and as acting for him, he must communicate it to his principal; he cannot make a profit out of his principal's business for himself. As I have said, a partner is an agent, and the principle applying to him is a branch of that gen-

(1) 17 Ves., 298.

eral rule which applies to agents. I agree with what has been said by both the noble and learned Lords who have spoken before me, that that is of necessity confined to those cases where it is part of the business of the company or firm that is carried on, and I think it is quite impossible to say that the purchase of a partner's beneficial interest in the partner's share in the partnership was one of those things in which the business of the company was carried on, and in which, therefore, Mr. Stewart may be considered as in the nature of an agent for that class of dealings for Mr. Cassels. It is upon that ground that I say that the class of cases I have referred to has nothing whatever to do with the present case.

There is a further ground upon which the appellant's case is put, namely, that by the special terms of the contract made between the partners, it is agreed that Mr. Reid shall continue a partner, that he shall not have the power in fact to sell his partnership interest, or at least, that if he did sell his partnership interest, that should not have any effect as against the other partners in the concern. Upon that I perfectly agree with what has been already said by the noble and learned Lord on the woolsack, and I do not think it necessary to repeat it.

The last ground, and the only one remaining to be spoken of, is this. It was said, as I understood the argument of the counsel for the appellant, that, although this transaction might have been all right if it had been disclosed, yet that inasmuch as Mr. Reid, by having made this agreement with his nephew by which he in substance and effect gave him a present of some £25,000 (for that is what it really amounted to) in this particular shape, *had deprived himself of [80 the beneficial interest in his partnership whilst he still retained the liability and still retained the power, he had by so doing deceived his partner, Mr. Cassels, and induced him to go on in the belief that he had the benefit not only of Mr. Reid's services and Mr. Reid's judgment, but also of Mr. Reid's services and judgment as having a strong pecuniary interest in making them as available as he could. I think that is about the strongest way in which the argument can be put. It was said that that was a positive wrong to his partner.

Now I pause to say that I do not think it was in the slightest degree morally wrong in the present case or in circumstances like those before us. I do not see that it could be supposed for a moment by the most conscientious moralist that there was anything wrong here. But I can see this:

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it may have led Mr. Cassels to suppose that he had Mr. Reid's personal interest to induce Mr. Reid to exercise his judgment judiciously, and to be more careful in giving his judgment and advice upon a thing than he would otherwise have been. It was said that that was a wrong, and then the argument that was based upon it was this: "We cannot prove that this has done the slightest harm" (in point of fact I think it is clearly proved that it never did the slightest harm), "but it might possibly have done some harm, and therefore" (and here it is that I confess I listened to both the learned counsel with some curiosity to see how they took this great stride in their logic), "although we cannot prove that it has done any harm, yet, as it might possibly have done harm, we say that there was a breach of contract with Mr. Cassels in the transaction, and it must be considered as having been a mere case of a mandate to one partner on the part of the other. I cannot see, my Lords, how that conclusion would follow from the premises; and not a single authority, or anything like an authority, has been cited for it.

I can only come to the conclusion, therefore, that the contract remains a good contract between Mr. Reid and Mr. Stewart as it was before Mr. Reid's death. It would have been better, I think, if Mr. Cassels had been informed of it whilst it was so going on. I generally think it is advisable as a matter of prudence, as well as on other grounds, to let 81] everything be above board; and therefore *I say it would have been better that he should have been told that Mr. Reid had made that arrangement; but his not having been told about it did no harm whatever, and inasmuch as even supposing harm had resulted from it, Mr. Reid would have been liable for that harm, that cannot entitle Mr. Cassels to say that as against Mr. Stewart the benefit arising from the purchase of Mr. Reid's share is to be given partly to Mr. Cassels. I think, therefore, my Lords, that upon all these grounds the case of the appellant totally fails, and consequently I quite agree in the proposed judgment.

LORD WATSON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lord's Journals, 19th Jan., 1881.

Agents for appellant: *Young, Jones, Roberts & Hale.*

Agents for respondent: *Grahames, Wardlaw & Currey.*

See 25 Eng. Rep., 843 note.

If one partner stipulates clandestinely for any private advantage or benefit of himself to the disadvantage or in fraud of his partners, he will in equity be compelled to divide such gains with them. Each partner is bound to act expressly for the benefit of the partnership: *Sanderson v. Sanderson*, 17 Fla., 828; *McMahon v. McClernan*, 10 W. Va., 419, 457-462.

The fact that a lease of premises used by a firm for copartnership purposes is to one of the copartners, does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will enure to the benefit of the firm.

M., plaintiff's testator, and defendant were formerly partners carrying on a hotel, the leases for which expired at the time fixed for the termination of the partnership. Prior to that time defendant, without the assent or knowledge of his partner, procured new leases in his own name for terms beginning at the termination of the partnership, which, upon discovery of the fact by M., he claimed to hold exclusively for his own benefit. This action was brought to have M.'s interest in the lease declared and adjudged. It appeared that during the pendency of the action, M. brought another action for a dissolution of the partnership and sale of its effects. The judgment therein directed, among other things, a sale of the furniture and fixtures belonging to the firm, leaving the question as to the disposition of the leases to be determined in this action. Sale was made accordingly, the property bid off by defendant, and M. received his proportion of the purchase price. Upon the final trial herein, which did not occur until after the expiration of the new leases of which defendant had had the benefit, plaintiff was allowed to prove, as a basis for computing damages, what the furniture, good-will and leases, if put up for sale together, would have brought, the partners each having a right to bid at the sale: *Mitchell v. Read*, 84 N. Y., 556, affirming 19 Hun, 418.

Where the members of a firm, upon its dissolution, agree to carry on the liquidation of the business together in the premises occupied by the firm, and thereupon one of the members and a

third party, having knowledge of the facts, take, in their own names, renewals of the unexpired firm leases of the premises, without the consent of the other partners, such lessees hold said leases as trustees for the firm; this, though the original leases contained no covenants for renewal: *Spieß v. Ross-wogg*, 48 N. Y. Super. Ct. R., 185, 68 How. Pr., 401.

One member of a firm, composed of several copartners, after the death of one of them, falsely, and with the intent to prevent a proposed settlement, represented to his surviving copartners that he had become the owner of the interest of the deceased, and thus prevented a purchase by them of such interest:

Held, that he cannot by compromise of a suit brought by one to whom the interest of the deceased was transferred and assigned, against all of the surviving copartners for an accounting, acquire the interest of the deceased, and maintain for his own benefit a suit against the remaining members of the firm to enforce the claim for the full amount of the profits which would have been due to the estate of the deceased copartner. The purchase of the interest of the deceased was made for the benefit of the plaintiff and defendants; and, after repaying the amount expended by the plaintiff in compromising the claim, the residue of the profits should be divided among all of the surviving copartners according to their respective interests: *Warren v. Schainwald*, 62 Cal., 56.

If after the termination of any partnership by death, dissolution, bankruptcy, or otherwise, the business is continued by a portion of the associates with the capital or appliances of the firm, all profits derived from such continued business are part of the joint estate, and as such are to be accounted for to all the partners or to their representatives.

No partner can make use of that which continues to be partnership property for his own use.

All partners are entitled to share in the profits and advantages which result from their use, unless, indeed, those general principles are changed or modified by the agreement of the parties; if they are, such agreement becomes the law which applies to the speciali-

ties of a case affected by it; *Fithian v. Jones*, 12 Phila. R., 201.

Where a partnership has taken a lease which has expired, but for the renewal of which negotiations are pending, it seems that it is not wrong that one of the partners should arrange with the lessor for his own continuance as lessee in case the partnership should come to an end by dissolution, or by the death of the other party.

Partnerships are for the mutual advantage of all the members, and all are to have the benefit of the advice, assistance and responsibility of their associates, and while they share the profits are also to share the losses.

Partnerships are founded in and must repose on mutual confidence and trust: partners are general agents for each other in the business, and where the association is terminated by the death of one, his representative cannot, of right, demand admission in his place.

Good-will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage.

But it attaches to the property, and in the case of a lease, belongs to the lessee only during its continuance, and on its expiration reverts to the lessor; and in fixing rent, the lessor can take it into the account as giving the property a part of its value.

The survivor of a firm of hotel keepers continued temporarily to use the furniture belonging to the firm, in carrying on the business, after the death of his partner. The latter's representative protested against its continued use, but enjoined its removal from the premises. Held, that the survivor could not be required to account to his deceased partner's estate for profits from the business during his continued use of the furniture under such circumstances, and that he was liable only for its deterioration and destruction while so used, and for interest on the amount. The survivor of two partners is not to be charged in behalf of the decedent's estate as for gains or losses resulting to the business from changes or improvements, which had been entered upon with the consent and at the expense of both, but which one did not live to obtain the benefit of: *Chittenden v. Whitbeck*, 50 Mich., 401.

The representative of a deceased partner in a firm of hotel keepers who have been occupying the hotel under a lease cannot, after the expiration of the lease, restrain the survivor from separating the furniture which belonged to the partnership from the rest of the hotel property, on the ground that its value depends upon its being used in connection with the good-will of the property, and that such separation would cause irreparable injury to the interest of decedent's estate in the partnership assets: *Whitbeck v. Chittenden*, 50 Mich., 426.

One of two partners, as attorneys at law, has no right, in the absence of a special contract or custom, to share in sums realized by the other as commissions for sales of stock in a railroad company; nor can he share in sums realized for services other than those which belong to their professional relations. Where he alleges that a sum was realized by his copartner for professional services, the burden of proof is upon him to establish it: *Sanderson v. Sanderson*, 17 Florida, 823.

T. and H., owners of a gold mine, agreed with S. to sell the mine on certain terms, within a time fixed, or otherwise the agreement was to be void. P. agreed with D. and T. that they should act jointly with him in forming a company to purchase the mine upon the terms fixed by T. and H., and should receive half the benefit to be derived by S. under his agreement with T. and H. Before the expiration of the time D. and Z. negotiated with T. and H. for the purchase of the mine themselves, and immediately after the expiration of the time purchased the mine. On bill by P. against D. and T. for a share of the benefit of their purchase:

Held, that the defendants were not guilty of any breach of partnership confidence towards the plaintiffs, and demurrer for want of equity allowed.

There is no contract, either express or implied, that co-adventurers in a contemplated purchase, to be completed within a given time, shall not deal singly with the vendor, for a bargain, to come into operation after the original bargain has expired by effluxion of time: *Pokorney v. Ditchburne*, 6. Wyatt, Webb & A'Beckett, 284.

[6 Appeal Cases, 82.]

H.L. (Sc.), Feb. 11, 1881.

[HOUSE OF LORDS.]

***M'KENZIE (Pauper), Appellant; BRITISH LINEN COMPANY, Respondents (').** [82]

Bill of Exchange—Forgery—Silence—Adoption of signature—Estoppel.

A person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel.

The names of A. and B. appeared on a bill as drawers and indorsers to the B. L. Co. The B. L. Co.'s Inverness bank discounted it for C., who signed it as acceptor. They had had no previous dealings with A. or B. Being dishonored when due, notice to that effect was sent to A. and B., and received late on a Saturday, but they did not communicate with the bank. On the following Monday, being the 14th of April, C. brought to the B. L. Co. a blank bill with A. and B.'s names as drawers and indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill but for a less amount, the difference being paid in cash by C. Three days before it was due, notice was sent to A. and B., and again when it was dishonored, and then through the B. L. Co.'s law agent. A fortnight after the first notice the B. L. Co. were informed for the first time that A. and B.'s signatures were forgeries, and they declined to pay the amount in the bill. A. alleged that he called on C. on the 14th of April about the first bill, that C. admitted that he had forged his name, handed him the bill, and solemnly assured him that it had been taken up by cash; and so assured he did not think it necessary to communicate with the bank. He admitted that on that day he drank with C. and borrowed £4 of him. He denied positively any knowledge of the second bill until he received the bank notices. C. was convicted of the forgery. The B. L. Co. charged A. with payment of the bill on the ground that he had either authorized the use of his name, or had subsequently adopted and accredited the bill, and therefore was estopped from denying his liability:

Held, reversing the decision of the court below, that in the facts proved A. had neither authorized nor assented to the use of his name; nor did the circumstances of the case raise any estoppel against him.

Dictum of Parke, B., as to estoppel in *Freeman v. Cook* (2 Ex., 654), approved of.

APPEAL from a decision of the First Division of the Court of Session, Scotland.

*In February, 1879, John Fraser, grocer, Greig [83 Street, Inverness, took to the agent there of the respondents, the British Linen Company, a bill for £76, dated the 7th of February, 1879, payable at two months from date. The bill bore to be signed by John Fraser as acceptor, and by the appellant, Duncan M'Kenzie, and a man named John Macdonald as drawers and indorsers. The agent discounted the bill, though neither the appellant nor Macdonald had

(1) Reversing Court Sessions Cases, 4th Series, vol. 7, p. 886.

any previous dealings with the British Linen Company. The bill became due on the 10th of April, and was not paid. On the 12th of April, which was a Saturday, the agent for the respondents posted a notice of dishonor to both the drawers. The appellant received this notice on the same evening; but he did not go to the bank. On the Monday following Fraser called at the British Linen Company's bank with a blank bill bearing to be signed by the appellant and Macdonald as drawers and indorsers, and by himself as acceptor. The signatures of the appellant and Macdonald were apparently the same as the signatures in the bill dated the 7th of February, 1879. Fraser requested the agent to renew the former bill, but he refused to do so for the full amount, but on payment by Fraser of £6 to the account of the bill of 7th of February, 1879, the blank bill was filled up with the sum of £70. It then purported to be a bill dated the 14th of April, 1879, for £70, drawn by the appellant and Macdonald on Fraser, payable at three months date, and indorsed by the two drawers to the respondents. The bill of the 7th of February was then delivered to Fraser.

On the 14th of July, three days before the bill dated the 14th of April fell due, the agent for the respondents wrote to the appellant, "Your bill on John Fraser for £70 is due on 17th July, and lies at the office for payment." This was received by the appellant, but he did not then come to the bank. The bill was dishonored on the 17th of July; and the agent for the respondents wrote to the appellant, "Your bill on John Fraser, 14th April, for £70 is lying in my hands under protest for non-payment. Be so good as to order it to be retired immediately." Receiving no answer, the agent wrote on the 21st of July calling the appellant's attention to the bill, and intimating that if it were not paid on the 84] 25th of July it would be put in the hands of *the law agent for the bank for legal proceedings. The appellant not replying, the matter was put in the hands of Mr. Ross, the bank's law agent; and he on the 25th wrote to the appellant and Macdonald, demanding payment of the contents of the bill. On the 29th of July Mr. Ross was waited on by Mr. McGillivray, the appellant's solicitor, who then on the appellant's behalf declined to pay the bill on the ground that the signatures thereto bearing to be his were forgeries. This was the first intimation that the respondents received that the signatures to the bill were forgeries.

It was not suggested that there was any change in the position of the bank between the 12th and 29th of July.

The respondents charged the appellant to make payment of the amount of the bill of the 14th of April, 1879, on the ground that it was drawn and indorsed by him, or with his knowledge and authority, and that he was aware that the said bill, having his name as drawer and indorser thereon, was presented to the bank; and if he did not draw and indorse the bill himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attached to drawing and indorsing them.

The appellant raised a note of suspension of the charge, and a proof was adduced before the Lord Ordinary.

The appellant is a contractor in a small way of business at Abriachan; he is not unfamiliar with bill transactions. He stated shortly, in his evidence that he never had any transactions with John Fraser, the acceptor. He had received a note from him dated the 11th of February, in which he asked him to call as "he had some particular thing to tell him;" but he did not pay any attention to that letter until he received the notice of the 12th of April from the respondents of the bill of the 7th of February, 1879. He then thought he must be the John Fraser mentioned therein, and he went to him on the Monday following and asked him if he had anything to do with the bill, Fraser admitted to him that he had forged his name, but he solemnly assured him that he had paid the bill by cash. Fraser handed him the bill of the 7th of February, and he took it away with him. Before he parted with Fraser he got from a letter, post dated the 15th of April, to the effect that before that [85 date he (M'Kenzie) had not signed a bill in his (Fraser's) favor. He got that letter, he said, to "show that he had nothing to with it, and that he had cleared the bill with cash." He then had a dram with Fraser in a public house, and Fraser lent him £3 or £4 for a few days, which he paid back. He did not make any inquiry at the bank as the bill had been cleared by cash. Then when he received the notice of the 14th of July he again went to Fraser, and accused him of not being "through with him when he did not tell him he had put in a new bill to relieve the other"; but Fraser assuring him that he would be ready to meet the bill when due, he did not then inform the bank. But on getting the second notice of dishonor he went to Inverness and put the matter in the hands of his law agent Mr. McGillivray, instructing him to protect him against the forgery. McGillivray, with the view of saving Fraser, in which attempt M'Kenzie appears to have assisted, spent some days

in trying to get the bill of the 14th of April renewed by another, but was unsuccessful.

The man Macdonald said that he had no knowledge of the second bill until he received the bank notice, and as to the first bill Fraser sent him a note that he had squared it, and not to mind the bank notice; M'Kenzie also told him it was squared.

The evidence of John Frazer himself, who had been by this time committed for trial on a charge of forgery, and of his father, was of quite an opposite character. John Fraser, the forger, said the appellant came to him to get the first bill renewed before he (Fraser) went to the bank about it; and that the appellant had authorized the renewal in his name, and Macdonald had also authorized his signature.

The father of John Fraser stated that his son told him M'Kenzie had signed both bills, and M'Kenzie himself told him he had signed the second bill and put it all right.

The appellant's material plea in law was:

1. The signatures upon the bill charged on, bearing to be the complainer's, never having been written by him, or with his authority or knowledge, and the respondents' averments of adoption being unfounded in fact, and insufficient in law, the complainer is entitled to have the charge suspended.

86] *The respondents' pleas in law were:

1. The said bill having been drawn and indorsed by the complainer, or with his knowledge and authority, there are no sufficient grounds for suspending the charge thereon.

2. The complainer having adopted said bills, is barred from pleading the forgery thereof.

The Lord Ordinary (1) held that the truth of the appellant's contention was established by the evidence.

Against this decision the respondents reclaimed, and in that action did not impeach the allegation that the signatures were forgeries.

The Lords of the First Division (Lord Shand dissenting), on the 4th of June, 1880, recalled the Lord Ordinary's interlocutor, and repelled the reasons for the suspension on the grounds (1) that the appellant was perfectly aware, or at least had very good reason to believe, that the first forged bill was replaced by the second forged bill, and that he permitted that to be done and acquiesced in the proceeding; and (2), that assuming such knowledge and acquiescence on the part of the appellant not to be established, he must nevertheless be said to have adopted the bill charged on by reason of his failure to give information to the respondents

(1) Lord Adam.

that his signature was forged after the receipt of the notices sent by the respondents in July, 1879⁽¹⁾.

Against this decision the appellant appealed, suing *in forma pauperis*.

Feb. 3, 4, 8. Mr. *David Brand* and Mr. *Rhind* (of the Scotch bar), contended for the appellant—who was a simple and illiterate man, though not unacquainted with bill transactions—that it was clearly shown by the evidence adduced that he did not know of the existence of the first bill until he received the notice of dishonor sent on the Saturday, the 12th of April; nor any knowledge or suspicion of the second bill until the arrival of the notice of the 14th of July. It was proved that at the earliest moment he could he went to the forger, who solemnly assured him that the bill had been paid by cash, and believing the forger, could not be said to be unnatural or unintelligible. Then as to *the other bill, so far as showing any desire to adopt [87 the forged signature as his own, they submitted he had done all that occurred to him to repudiate it. His silence as regards the bank, from the 14th to 29th of July, did not alter the position of the bank, or put the bank in any worse one, for the bank's position was unalterably fixed on the 14th of April. Nor could he be said to have misled the bank by his silence on the 14th of April, for its agent, without waiting to hear from him a longer time than from a Saturday to a Monday, on that very day renewed the bill—a bill the signatures to which the agent had accepted as genuine—without the slightest previous attempt to find out whether they were so or not. The only evidence against the appellant was that of the Frasers: persons whose testimony could not be held to outweigh that given by the appellant and the man Macdonald. The forger was then awaiting his trial, and both he and his father were interested in giving evidence in a certain direction. Therefore, though it might be said that the appellant had been careless in not making inquiry as to the truth of Fraser's statement on the 14th of April of the bank; they submitted that it was not proved that the appellant tacitly or otherwise authorized the use of his name on the bill charged, or that he ratified or adopted his forged signature thereto, or that he was now estopped from relying on the forgery. The law of Scotland and England as to bills of exchange was not dissimilar.

They commented on *Finlay v. Currie* ⁽²⁾; *Boyd v. Rob-*

⁽¹⁾ Court Sess. Cas., 4th Series, vol. vii, p. 836.

⁽²⁾ Court of Sess. Cas., 2d Series, vol. xiii, p. 278.

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ertson ('); *Fraser v. Maclellan* ('); *McArthur v. Pater-son* ('); *Brown v. British Linen Company* ('); *Urquhart v. Bank of Scotland* ('). Cases of estoppel, *Cairncross v. Lorimer* ('); *Smith's Leading Cases* (8th ed.), vol. ii, at 88] p. 896; *Freeman v. Cook* ('). These *cases so far as affecting the question here will be found fully dealt with in Lord Watson's judgment (').

J. B. Balfour, S.G. (Scotland), and Mr. *Chitty*, Q.C., for the respondents, submitted that it was established by the evidence that the appellant had before or on the 14th of April authorized the use of his name, or had on that date a

(¹) Court of Sess. Cas., 2d Series, vol. xvii, p. 159.

(²) Court of Sess. Cas., 2d Series, vol. xii, p. 208.

(³) Court of Sess. Cas., 1st Series, vol. iii (2d ed.), p. 427.

(⁴) Court of Sess. Cas., 3d Series, vol. i, p. 793.

(⁵) 9 Scot. Law Rep., 508.

(⁶) 3 Macq., 827.

(⁷) 2 Ex., 654. That was a case where, upon the sheriff seizing goods, a party had made certain representations as to the ownership of them, and the question was whether he was estopped from disputing the truth of what he had so said. Baron Parke said "the estoppel, therefore, if it be one, created by the conduct of the bankrupt in this case, is not opened by the omission to plead it, and the only question is, whether it be an estoppel? It is contended that it was upon the authority of the rule laid down in *Pickard v. Sears* (6 Ad. & El., at p. 474). That rule is, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. That was founded on previous authorities: in the cases *Graves v. Key* (3 B. & Ad., 318); *Heane v. Rogers* (9 B. & C., 586), and has been acted on in some cases since. The principle is stated more broadly by Lord Denman in the case of *Gregg v. Wells* (10 Ad. & E., 97), where his Lordship says that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself

assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard v. Sears*, must be considered as established. By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all the contracts made by them with third persons, on the faith of their being so authorized." Nearer the end of his judgment Baron Parke further says: "In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it." See, also, *Jorden v. Money* (5 H. L. Cas., at pp. 214, 255), *Clarke v. Hart* (6 H. L. Cas., at p. 656), and *Howard v. Hudson* (2 E. & B., at p. 10), where this opinion of Baron Parke was acted on.

(⁸) *Post*, at p. 110.

knowledge that the second bill had been put in. On the other hand, taking it that he did not know till the notice of the 14th of July, from that date *his silence, and his [89 efforts to get the bill taken up constituted ratification and adoption.

On the appellant's own evidence, it was clear that on the 14th of April he suspected the existence of the second bill. He found Fraser's shop, which could not be started without the forgery of the first bill, still a going concern, and that Fraser was able to lend him £4. The argument that he had no serious suspicion could not be maintained, as it left the post-dated letter of the 15th of April wholly unaccounted for. The appellant stated the object of that letter was to show that the bill was paid in cash, but it contained no words to that effect. If anything, that letter showed that M'Kenzie wanted to make evidence in his own favor, in case the bill was not paid. Against the appellant's evidence they had that of the two Frasers; and the fact that the bill was renewed on the very day of the appellant's visit to John Fraser, corroborated their story. Then the appellant's silence from the 14th of July, and his activity for over a fortnight, trying to get Fraser's uncle to take up the bill—to screen Fraser—leaving the bank in the dark while he tried to make provision to again deceive them—that and his knowledge of the first forgery, suggested that he himself was implicated, or, at all events, was of itself sufficient to infer adoption of the bill. They had here, they submitted, an element of conduct which, coupled with his silence, made him liable. Lord Shand, in the court below, said that silence, even obstinate silence, or inaction, was not enough; but the Lord Ordinary, who acquitted the appellant, was not of that opinion, and many cases could be figured in which assent may be inferred from silence, with a certainty just as absolute as it could be inferred from words. There was no doubt as to the law: if previous decisions were to be followed. In *Urquhart v. Bank of Scotland* (1), silence and inaction—failure to disclaim the bill until after nineteen days—were the grounds on which the charge was supported. That case was singularly like this—there the forger had previously forged the name of the suspender to several bills: here Fraser forged the appellant's name to one bill only. In *Urquhart's Case* the person whose name was forged does not seem to have suspected the existence of the *bill [90 until overdue—but in this case Fraser had the strongest

(1) 14th June, 1872; 9 Scot. Law Rep., 508,

reason to suspect the existence of the bill at the date it was drawn. The Lord Ordinary seemed to think that in *Urquhart's Case* the bank suffered prejudice by the failure of the suspender to disclaim the bill, but that did not appear to be the fact in either that case or *Brown v. The British Linen Company* (*)—a case of relevancy. For though the forger absconded in *Urquhart's Case*, he was afterwards apprehended, and in neither case was damage to the bank any part of the allegations of the charger; but here there was no doubt the bank was damnified by the appellant's failure to communicate with them on the 14th of April. In *Findlay v. Currie* (†) it was distinctly settled that a charge might proceed on a forged bill if it had been accredited or adopted, there Lord Fullerton said that in such cases, the suspender is held barred from pleading that ground of suspension, and in that case there was no averment of anything but silence. The earlier case of *McArthur v. Paterson* (‡), was no authority that mere silence may not be sufficient; and *Boyd v. Union Bank* (†) and *Warden v. British Linen Company* (†), were merely cases in which the facts were insufficient to prove adoption. They submitted that here the bank was misled and suffered from the appellant's conduct, whose clear duty it was to have disclosed the forgery, and that the law which holds him liable on account of his failure to do so was sound in principle and wholesome in practice.

Mr. *Brand*, in reply.

The Law Peers delivered judgment as follows:

LORD SELBORNE, L.C.: In this case there are two questions; the first whether the appellant authorized or assented to the signature of his name as drawer and indorser of the bill of exchange of the 14th of April, 1879; the second, 91] whether, if he did not, he has nevertheless so *acted as to be estopped from denying his liability on that bill in a question between himself and the respondents, the British Linen Company.

If the first of these questions ought to be answered in the appellant's favor, I am clearly of opinion that the circumstances of the case raise no estoppel against him. He has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for

(†) 1868; Court of Sess. Cas., 3d Series, vol. i, p. 798.

(‡) 1825; Court of Sess. Cas., 1st Series, vol. iii (2d ed.), p. 427.

(†) 1850; Ibid, 2d Series, vol. xiii, p. 278.

(†) 1854; Ibid, 2d Series, vol. xvii, p. 159.

(†) 1868; Court of Sess. Cas., 3d Series, vol. i, p. 402.

their own security, or in any sense for their benefit, which they would otherwise have taken; nothing from which the respondents or a court of justice could reasonably infer that he "adopted," or admitted his liability upon, this bill.

The merits of the respondents appear to me to be extremely small. They took from John Fraser the first bill for £76 on the 7th of February, 1879, bearing the signatures of the appellant and John Macdonald, without any knowledge of these parties, or of their handwriting, and without any inquiry whatever. The bill was not one which had been previously in circulation; it was offered by John Fraser to the bank to obtain a loan of money for his own benefit, for the purpose of paying for a grocery business which he was then taking up in Inverness. John Fraser had not been their customer before; they knew nothing of him, except that he had been in the employment of a respectable merchant who was one of their customers. On Saturday, the 12th of April, 1879—two days after the bill became due—they caused notice to be given to the appellant, and also to Macdonald, both of whom resided and were in employments at some little distance from Inverness. But on the following Monday, before any reply had been or could reasonably have been expected to be received to these notices, they gave up this bill to John Fraser in exchange for £6 cash and for another bill which, when produced to Mr. Williamson, was signed in blank with the same names, and was filled up by John Fraser in Mr. Williamson's presence for £70, being the bill now in question. It is impossible for the respondents to contend that any conduct or silence on the appellant's part caused them to take either the first or the second bill, or to abstain, on the 14th of April, from doing anything for their own security which they would otherwise have done.

*The respondents, on the 14th of July, 1879 (before [92 the second bill became due), and again on the 18th and 21st of July (when it was overdue) gave notices to the appellant; and on the 29th of July they were informed that he denied his signature to, and his liability upon, that bill. There is no principle on which the appellant's mere silence for a fortnight, during which the position of the respondents was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or to estop him from now denying it. What took place during the interval was unknown to the respondents; and it has, in my opinion, no tendency to show that, in point of fact, the appellant then was, or admitted himself to be, or intended to become, liable.

He communicated as early as the 18th or 19th of July with Mr. McGillivray, a law agent, expressly on the footing that his name had been forged, and that he was not liable. It is plain that Mr. McGillivray was desirous, if possible, to get some settlement made, by which criminal proceedings might be avoided. The appellant was also quite willing that such a settlement should be arrived at, if it could be done without making him liable. No such settlement, however, was arrived at; and I am unable to discover in the communings which then took place, any ground, in fact or in law, on which the appellant ought to be held to have become liable on the bill by reason of those communings, if he was not so before.

The question, therefore, in my judgment, is only one of fact; viz., whether the appellant did or did not authorize or assent to the use of his name on the 14th of April by John Fraser; and it appears to me that the *onus probandi* on this point rests entirely upon the respondents, it being admitted that the signature to the bill of the 14th of April is not in the appellant's handwriting. The question, I think, turns altogether upon what took place when the appellant met John Fraser on that day. If it is shown that he then knew, or had reasonable grounds to believe, that a new bill, with his name upon it, had been given by John Fraser to the respondents, the conclusion (under all the circumstances) would be inevitable that he assented to, and became bound by, the use so made of his name. On the contrary supposition it is, of course, impossible to hold that he assented 93] to that *of which he was ignorant, and which he had no reason to believe.

This is, in great measure, a question depending upon the credit to be given to the witnesses on each side. If John Fraser and his father are believed, the case against the appellant is established. But John Fraser and his father (besides the discredit attaching *prima facie* to a witness acknowledged to have been guilty of forgery, and to one closely related to him, and identified with him in feeling and interest,) prove more than, in view of the undoubted facts of the case, I find it possible to believe. According to the father, John Fraser told him that the appellant had actually signed both the bills; Macdonald said he had signed the second bill; and the appellant said he had "put the second bill all right." According to John Fraser himself, the appellant came to him to get the first bill renewed before he (John Fraser) went to the bank about it, and expressly authorized the renewal in his name. If these statements were true, the appellant's signature was subscribed to both

bills by his authority, and there was no forgery; nor was there any reason why he should not have signed the second bill himself. I am unable to place any reliance whatever upon the evidence of either of these persons.

The Lord Ordinary, who heard and saw the witnesses, gave credit to the appellant, and refused it to the Frasers. Taking the case as it stands upon the evidence of the appellant and of Macdonald, both of them distinctly deny knowledge that a second bill had been given, and, *a fortiori*, that it had been given in their names: the appellant says he was solemnly and positively assured by John Fraser that the first bill had been taken up, not by way of renewal, but by payment: and the assurances given to Macdonald were that he "had squared it." I cannot but say that some of the circumstances, as they appear upon the evidence of these two persons, are, to my mind, suspicious and unsatisfactory. If the burden of proof lay upon the appellant, I might perhaps doubt whether he had satisfied it. But the burden of proof is on the respondents; and it is impossible, merely because there are some suspicious circumstances, not satisfactorily explained, to hold a man liable upon a bill which he did not sign or authorize, and of the existence of which he swears he was ignorant.

*The suspicious circumstances are: (1.) That the [94] appellant, after learning on the 14th of April that his name had been forged to the first bill, did not communicate with the bank; (2.) That he required the acknowledgment (No. 18 of process) to be given him under John Fraser's hand, which is dated the 15th of February, and which merely says, "Before the above date Mr. Duncan M'Kenzie did not sign a bill in my favor;" (3.) That when he took away the first bill of the 7th of February he did not destroy it, but gave it to a young man named James Fraser to keep, assigning as his reason "that it might be a warning to him not to do the like;" (4.) That the interview of the 14th of April ended in an adjournment to a public house, and in a loan of £4 by the forger to the appellant, which the appellant says he afterwards repaid by the hand of James Fraser; and (5.) That there was the delay already mentioned in July, before the appellant gave notice to the bank, that is to say, to Mr. Williamson, that the second bill was a forgery; and that, when he did say so, he blamed Mr. Williamson for not insisting "on a further reduction when the first bill became due."

This latter circumstance appears to me to amount to very little or nothing; and, after much consideration, I think

that all the other circumstances admit of explanation upon the hypothesis that the appellant was thinking of the first bill only, and had no idea that a second bill, also bearing his signature, had been given on the 14th of April, as easily as, or more easily than they do upon the contrary supposition. Evidently he had no sensitive feeling on the subject of forgery, so long as he did not himself suffer by it: he condoned it with great facility to John Fraser; he did not wish to inform against him; he was willing to remain on friendly and familiar terms with him, and perhaps also to squeeze out of him some temporary accommodation as the price of his silence, without regard to the difficulties he might be under, if he had really himself found the money to take up the first bill. But how that money was found (being himself unwilling to help) the appellant might also not choose to inquire: it might have been borrowed from the uncle, William Fraser, or from somebody else, without making it necessary to suspect any second forgery. The document dated the 15th of April (whatever else may be said 95] *or thought of it) is inconsistent with the story now told by the Frazers, and confirms (as far as it goes) the appellant's statement that John Fraser did then assure him that there had been no renewal of the first bill, at all events in his (the appellant's) name. The fact of the acknowledged forgery might suggest precautions against future forgeries, though there might be no knowledge, or belief, or suspicion, that any such had already taken place. The appellant might, not unreasonably, consider it a proper precaution against any such possible repetition of the offence, to retain the first bill, to admit some persons whom he thought discreet, to his confidence about it, and to have, under John Fraser's own hand, what (in truth) amounted to an admission of the forgery of that document, and to an acknowledgment that he had, down to the 15th, signed nothing for John Fraser's accommodation. The possession of those papers gave the appellant a strong hold over John Fraser. With the first bill in his own hands he had no longer anything to fear from the notice which he had received from the bank; and he might think it the most prudent course to abstain from making any communication to Mr. Williamson which might place him in the dilemma of either having to discover John Fraser's guilt, or seeming to admit that he had himself been liable on that bill. I do not say or think that the appellant's conduct, if it is to be thus explained, was commendable or satisfactory: it was not such as might have been expected from a scrupulous man

with a strong sense of moral propriety ; but it was, on the other hand, by no means such as to require, for its explanation, that he should have had in his mind any belief, or even suspicion, that another forgery of his name had taken place on that 14th of April, contrary to the positive assurances which he states he had received from John Fraser.

The burden of proof is (as I before said) upon the respondents. In my opinion they have failed to satisfy it. I think, therefore, that this appeal ought to be allowed, and I move your Lordships accordingly.

LORD BLACKBURN: My Lords, this case comes before your Lordships by way of appeal from the First Division of the Court of Session against an *interlocutor by [96 which the majority, consisting of the Lord President, Lord Deas, and Lord Mure, reversed the interlocutor of the Lord Ordinary, Lord Shand dissenting. As the Lord Ordinary (Adam), who tried the cause, saw the witnesses and heard them give their testimony, he had an advantage, in so far as regards any question depending on their credibility, which neither the judges of the First Division nor your Lordships possess ; and therefore, so far as anything turns on the credibility of the testimony, his judgment is not lightly to be overruled. As to the inferences to be drawn from admitted facts, the Lord Ordinary had no advantage over either the Lords of Session or your Lordships. I think, therefore, that though the numbers are three to two, the case comes before this House without any great superiority of authority.

It is not disputed that John Fraser took to the agent of the British Linen Company a bill for £76, dated the 7th of February, 1879, and payable two months after date, purporting to be drawn by the appellant M'Kenzie and a man of the name of John McDonald on and accepted by John Fraser, and that the agent discounted that bill, it does not precisely appear when, but about the date of the bill. It was understood between Fraser and the agent that when the bill became due the amount should be reduced and a renewed bill given and discounted for the balance. It is not now disputed that the names of neither of the drawers were in their own handwriting. The agent, who knew neither of them, acted entirely on the faith of John Fraser's representations. The bill became due, and was dishonored on the 10th of April, 1879. On the 12th of April, 1879, which was a Saturday, and not before, a notice of dishonor was sent by post to M'Kenzie, and it is not disputed that he did receive it on the evening of that day. On Monday the 14th of April, Fraser came to the agent bringing with him a

paper stamped for a bill, and with the names of M'Kenzie and Macdonald, apparently in the same handwriting as those on the bill of the 7th of February, written on it in the places where the names of the drawers and indorsers should be. Fraser wished the bill to be renewed for the whole amount. The agent declined to do that—but after talking it over, it was agreed to be renewed to the extent of £70, 97] and that a larger reduction *would be made when the bill was renewed again. It was then filled up as it now is, so as to purport to be a bill dated the 14th of April, 1879, for £70, drawn by M'Kenzie and Macdonald on John Fraser, payable three months after date to their order, accepted by Fraser and indorsed by the two drawers to the British Linen Company. Fraser paid £6 and the charges. The bill of the 7th of February was then given up to Fraser, who took it away. The question in the cause is, whether on the facts proved, M'Kenzie is liable to the British Linen Company on this bill of the 14th of April.

Pausing for a moment here in my narrative of the facts now in dispute, it seems to me clear, though I do not think it is quite admitted, that the agent acted in discounting this bill as he had acted in discounting the bill of the 7th of February, entirely on his faith in Fraser's representations. Having sent off the notice of dishonor so late as the Saturday by post, he had no right to suppose the drawer would be with him so early as the morning of the Monday, and therefore the undisputed fact that M'Kenzie had not done anything to deny the genuineness of his signature could not, as yet, afford any new ground for believing it was genuine.

To proceed with the undisputed facts—M'Kenzie did not inform the British Linen Company that his signature to the bill of the 7th of February was a forgery. On the 14th of July, 1879, an intimation was sent by post to M'Kenzie that "your bill on John Fraser, Greig Street, Inverness, for £70 is due on 17th July, and lies at this office for payment." This was received by M'Kenzie, who did not come to the bank. On the 17th of July the bill was dishonored, and on the 18th of July notice of dishonor was sent, which it is admitted was received by M'Kenzie. On the 21st of July, which was a Monday, a notice was sent that if not paid on Friday it would be put in the hands of their law agent. On the 25th of July the law agent, Ross, wrote, and on the 29th of July a writer of the name of McGillivray, who had been employed by M'Kenzie, informed Ross that M'Kenzie's defence was that his signatures as drawer and indorser were forge-

ries. This was the first intimation that was given to the bank that the genuineness of the signatures was denied.

The disputed facts depend on the effect given to the testimony, *as to the credibility of which there has been [98 a great difference between the judges below. M'Kenzie had not only denied his liability to the bank, but he had charged John Fraser with having forged his signature. If this was a falsehood it was a very wicked one: and once having pledged himself to it, he had every motive to persevere in his falsehood. John Fraser was brought to give evidence from the prison to which he had been committed on M'Kenzie's charge, and had a very strong motive to try to fix M'Kenzie with responsibility even by a falsehood. It does not, however, by any means follow that he was not fixing him by telling the truth.

The testimonies of these two witnesses, as might be anticipated, are in direct conflict. The Lord Ordinary and Lord Shand believe M'Kenzie to swear truly when he says that he never knew or suspected that his name was on the second bill till he got the intimation of the 14th of July. The Lord President and Lord Mure believe, directly in contradiction of his testimony, that he was aware of it. The Lord President says, "I am disposed to come to the conclusion that the complainer was perfectly aware, or, to say the least of it, he had very good reason to believe, that the first forged bill was replaced by the second forged bill, and that he permitted that to be done, and acquiesced in the proceeding, and was clearly participant in the fraud that Fraser had committed upon the bank." Lord Deas I think proceeds upon another ground.

Before examining the testimony I wish to consider what it was relevant to prove, for I think some confusion has arisen below from not keeping the different points separate. As it is not now disputed that none of the signatures were written by M'Kenzie, being in fact all written by Fraser the acceptor, the burthen of proving that he was liable on them rests on the bank. If M'Kenzie authorized Fraser to write his name for him, he gave him a mandate to sign, and is, of course, liable, and there was no forgery on the part of Fraser. This is a question of fact depending on the evidence. If I thought it was satisfactorily proved that M'Kenzie, before Fraser uttered the bills with his name upon them, knew that Fraser was going to do so and took no steps to hinder him, I should not have much hesitation in drawing the inference *that he did authorize him. But even though [99 it was not made out that the signatures were authorized

originally, it still would be enough to make M'Kenzie liable, if knowing that his name had been signed without his authority, he ratified the unauthorized act. Then the maxim "*Omnis rati habitio retrotrahitur et mandato priori equiparatur*," would apply. I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another. The Lord President says:

There is another averment which brings out elements of particular importance in this case. This bill was a renewal of a previous bill with the same names upon it for the sum of £76. Upon the face of that bill the complainer and Macdonald were drawers, and John Fraser was the acceptor, and that bill had been also discounted with the British Linen Company, and this £70 bill, as I have said, was a renewal to the extent of £70 of that previous bill. The averment made is further: "He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and indorse the bills himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and indorsing them." There are two averments here which require to be distinguished. The one is that the complainer was aware that this first bill with his forged name on it as drawer was presented to the bank and discounted by the bank in reliance upon his name being genuine. That means, of course, that at the time at which it was presented to be discounted the complainer was aware that his signature thereon was a forgery; and if that is established I think the case is clear indeed, because in that case the complainer would be distinctly *particeps fraudis*, and probably answerable criminally. But the other averment is this—that by his conduct, not silence merely, but silence combined with his conduct, he allowed the bank to rely upon his signature being genuine, and so adopted it as his genuine signature.

Now I cannot but think that he here confuses two separate propositions of law: one to which I fully assent with an-
[100] other, *which is that on which Lord Deas, as I understand him, bases his judgment, to which I do not assent, without qualifications which prevent its being applicable to this case. As I have already said, I think if he ratified to anybody or for any purpose the act done by Fraser as professing to be his agent, that for all civil purposes enured to make him liable just as if he had originally authorized that act, and his conduct and silence combined with his conduct

may prove such a ratification ; and if the phrase, "adopted it as his genuine signature" is to be understood as meaning that he ratified, I quite agree with what is said.

And I agree that though he did not ratify the act of Fraser, yet he may preclude himself, bar himself, by a personal exception from averring against the bank that the signature was not genuine. Lord Deas says "that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank from recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill which otherwise they would." I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank. But when Lord Deas says : "In cases of this kind where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something, or not saying or doing something, to lead his neighbor to think that his signature is genuine to his neighbor's loss," he goes further than I am inclined to follow in the words "by not saying or doing something." And when he says, "there was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill," I not only doubt his position that there was a legal duty then to *have informed the [101] bank, but I deny his conclusion of fact. As I have already pointed out, the second bill was uttered to the bank before M'Kenzie, with the utmost diligence, could have informed the bank that the first was forged. It would be quite a different thing if it were proved that M'Kenzie knew that the bank had put the second bill with his name on it to Fraser's credit, and knew that at a time when he had reason to believe that he would be permitted to draw against it. His silence then would certainly prejudice the bank, and would afford very strong evidence indeed that M'Kenzie for Fraser's sake thus ratified Fraser's act for a time ; and a ratification for a time would, I think, in point of law

operate as a ratification altogether. But if M'Kenzie (as his case is) first knew that the bank had taken the second bill on the faith of his forged signature on receiving the intimation of the 19th of July, he knew that the bank were not going to give further credit to Fraser on the faith of that signature; and that all the mischief was already done. I cannot think that even if M'Kenzie had gone so far in his endeavors to shield Fraser from the consequences of his criminal act as to make himself liable to criminal proceedings for an endeavor to obstruct justice, that would bar him from averring against the bank that the signature was not his. Certainly I think that his not telling the bank on the 15th of July nor till the 29th of July that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval nor lost any remedy which if the information had been given earlier they might have made available.

The principles which I have above assumed to be law have been recognized in England ever since the clear judgment of Mr. Baron Parke in *Freeman v. Cook* (*). The Scottish cases cited at your Lordships' bar show that those principles have not been so clearly recognized in Scotland. I leave to my noble and learned friend who is to follow me the task of commenting on the Scotch decisions, which he is much more competent to perform, merely saying that I have read them all, and that every one I think is perfectly consistent with the principles I have stated, and I think their justice must be acknowledged by all.

102] *As to the question whether the evidence of M'Kenzie is substantially true or not, I shall be more brief. The Lord President reads his statement as to the conversation which took place at Abriachan Wood, and draws the conclusion that M'Kenzie knew Fraser "could not have a penny to spare." I cannot go so far, but I think that it does show that M'Kenzie doubted his solvency; the last inference which I should draw from that is that he would readily become surety for him. Soon after that conversation he received the letter of the 11th of February written, be it observed, after the bill of the 7th of February had been discounted. He says that he did not go in to see Fraser because he knew that there was no business between them he, M'Kenzie, would lose by not calling on him, but that when he received the notice of the 12th of April he recollected this

(*) 2 Ex., 654; see note, *ante*, p. 87.

letter, and suspected that Fraser had put his name to a bill, and accordingly went into Inverness on the Monday to see Fraser. I can see nothing incredible in this. Then he says that—

We went into a back room where, showing him the notice, I asked him if he had anything to do with this. He said he had, "but," he added, "it is not going to trouble you any more." I asked him what he meant by doing such a thing? Q. Doing what?—A. By forging that bill in my name. He said, "I did not know the danger of it at the time." I told him I would not pass him, but would give him up to the fiscal at once. He said, "You need not do that; I have the bill here, and it will not meddle with you after this." He showed me the bill. Q. Was anything said between you about the renewal of the bill?—A. Not a word. I told him at the same time, "See that you don't put in another to relieve this one." And he said upon his soul and body he would not. He told me that he paid it in clear cash. This conversation between us was in Gaelic. I believed him when he said the bill was paid. With the bill he gave me I went up to the shop of Mr. James Fraser, No. 1 Ness Walk, who belongs to the same place as I belong to, and I gave him the bill and he kept it. I never saw Fraser of Greig Street again until I heard about the second bill.

Why he gave the bill to James Fraser to keep is never explained. If his story is true I see no motive for it; but if John Fraser's story is true I see as little motive for it.

Then there is what I think the strongest piece of evidence in favor of the bank. It is not brought in as a prominent part of their case, but in re-cross-examination:

Re-cross-examined:—(Shown No. 18; letter dated the 15th of April.) This letter was written by Fraser when the first bill was got up. He told me he would give me that letter to show that I had nothing to do with it, and that he had cleared the bill with cash. I asked him for a letter to that effect. Q. Did you say you wanted to show [103 the letter to your sister?—A. No. Q. Did you say your sister had been angry at you for going into the bill?—A. I could not say that for I did not go into the bill. I had had no quarrel with my sister about the bill. I told her from the first day that I got any notice of it that it was forged. On the day when I got No. 18 I dare say Fraser and I had a dram together, I think in the Lorne. I was not very long with him. I think he lent me £3 or £4 for two or three

days. I was parting with him on the other side of the bridge, and said I had to look for £2 or £3 for a day or two, and he said, "I will give you that," and he gave me £4. That was repaid three or four days after I got it. I sent it to him by James Fraser. Q. Do you remember meeting John Fraser in Greig Street, near his shop, about the month of February, 1879, and asking him how he was getting on with his shop, and whether he would be able to clear the bill? *Objected to. Objection repelled.*—A. I don't mind of that occasion for it never happened. *By the Court:* Q. How did Fraser come to give you the first bill that was forged.—A. When I went to him with the notice I had received from the bank, he had the bill settled in the bank before I got to his shop. Q. Did you ask him for it?—A. No, he showed it to me to satisfy me that it was fully settled, and gave it to me. I don't know if he told me to take it away. He did not ask it back. Q. Did you put it in your pocket and go away with it?—A. Yes. Q. You told us the first time you spoke to Fraser's father was after the forgery became known in the district; but you said afterwards you spoke to him after you had got the first notice about the bill?—A. Yes. The forgery was quite current in the district after the first bill. It was known that it had been forged.

John Fraser, who is brought from prison to give evidence, gives, as might be expected, a very different account of the whole transaction. He says that M'Kenzie came into him, as he expected he would, to talk about renewing the bill. He is not asked when anything had occurred to make him expect M'Kenzie to come for that purpose, but clearly implies that M'Kenzie had before that had knowledge that the first bill was discounted, and that it was, when it became due, to be reduced in amount and renewed as to part; and he distinctly swears, both in chief and in answer to the Lord Ordinary, that M'Kenzie, before he went to the bank to get the bill renewed, authorized him to get M'Kenzie's name put on the renewed bill. Why M'Kenzie did not write his own name on the blank stamp is never explained.

Then as to the transaction in the public house, he says:

It was £5, or something that he wanted. I did not sign it until he came in, and he went to the Royal Bank to cash it there. I don't remember when I saw M'Kenzie after I got the first bill from the bank, but he came to my shop and I showed him the bill. We had gone to a public house. I had left a boy in the shop. He said his sister and mother [104] were kicking up a row at home against him *for giv-

ing me the bill. I gave him the bill, or he took it and kept it. (Shown No. 16.) This is the bill I gave him. I think he borrowed £5 from me on that date. We had some drink. I drank lemonade, and he drank whisky. We were alone together for a good long while. Q. Did you give him that bill, or did he take it?—A. He took it. As far as I remember, he did not say why he wanted it. He wanted to get a note from me that he would show his sister, because they were kicking up a row. (Shown No. 18.) Q. Did he ask you at that time to write a letter, and did you write this letter? (*The Lord Ordinary again cautioned the witness.*)—A. I did, in order that he should show it to his mother. Q. Did he say he wanted it because his sister was making a row about it?—A. Yes; so that they would not know about it. I think I wrote it in the public house. I don't remember how much drink I had that day with him. He did not, so far as I remember, say why he wanted the old bill.

Now, if I could see my way to thinking it proved, as the Lord President does, that M'Kenzie knew that Fraser was in such want of money that he could not possibly have met the bill in cash, and had £3 or £4 over to lend, I should think that his borrowing £3 or £4 from him then would go very far to show that he knew that Fraser had renewed the bill with M'Kenzie's name on it, and either had, as John Fraser swears, expressly authorized his doing so, or, at all events, then ratified it. And though it is imputing to M'Kenzie that he not only committed perjury for the purpose of defeating the just claim of the bank, but had committed the far more wicked crime of giving information to the fiscal leading to the making of a charge of forgery against Fraser, when he, M'Kenzie, well knew that Fraser had not committed forgery at all, yet no doubt that may be true. But I cannot think there is enough evidence to justify me in finding such a very serious charge proved. I think the evidence that M'Kenzie must have known that Fraser could not have had such command of money, by the aid of his friends or otherwise, to be able to pay £76 in cash is insufficient; and the evidence as to the loan itself is brought in so much by the way (not striking the Lord Ordinary, who tried the cause, as of importance), so that no opportunity was given to explain it, that I cannot rely upon it.

John Fraser's evidence is, I think, on the face of it so improbable that I cannot trust it. And it is distinctly in conflict with that of Macdonald. John Fraser, the father, no doubt says:

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I went to the bridge, and my son came past me, and I followed him and asked him how he had got on. He said 105] to me, "The bill is all right." I did not *speak to Duncan M'Kenzie that day; but when I was repairing the road 150 yards from his house, I saw him one day, and he stood speaking to me, and said, "I am sure John would tell you about the bill." I said, "Yes." He said, "Well, I have put it all right now." This was after the bill was due in April. M'Kenzie said, "The bill is in my possession now." He tapped his breast as he said so. Q. Did he speak to you about the second bill?—A. He said the second bill was in before he got the first one out. I cannot say that he said that, but he meant that the second was in the bank before he got the first out. Q. Did he say how much the second bill was for?—A. He said there was too much in the first bill; that there was £76 in it, but that £8 had been taken off. I am quite certain he said that about that time.

This, if accurately remembered and truly reported, would show an admission by M'Kenzie. But I cannot trust the accuracy of this evidence.

As to what happened afterwards, I have no doubt that M'Kenzie would have been quite content to say nothing about the forgery if John Fraser or John Fraser's friends took up the bill and freed him from responsibility. And I have no doubt that he delayed making the charge of forgery from the time when he received the intimation till the 29th of July, in hopes that they would do so; but, as I have already said, I do not think that he thereby made himself liable to the bank unless the bank was in some way prejudiced by that delay, which in this case it was not. I therefore agree in the motion which the noble and learned Lord has made, that the interlocutor should be reversed.

LORD WATSON: My Lords, the process of suspension in which the present appeal is taken was raised by Duncan M'Kenzie, the appellant, in order to obtain a stay of summary diligence which the respondents were proceeding to use against him on a bill of exchange, at three months, for the sum of £70 sterling, and bearing date the 14th of April, 1879, upon which his name appears as that of a drawer and indorser, along with another person of the name of John Macdonald.

The sole ground of suspension stated for the appellant is, that the signatures upon the bill charged on bearing to be his, are forgeries. The respondents on record denied that allegation, but the Lord Ordinary, who gave judgment in

the appellant's favor, *held that its truth was established by the evidence. In the Inner House the respondents do not seem to have impeached the soundness of that conclusion; and the Lord President accordingly states that "although originally the chargers denied that allegation it must now be taken that the complainer's signature certainly is a forgery."

The majority of the First Division of the Court of Session, consisting of the Lord President, Lord Deas, and Lord Mure, gave judgment against the appellant upon these two grounds: (1.) that the appellant was, to use the language of the Lord President, "perfectly aware," or at least "had very good reason to believe that the first forged bill was replaced by the second forged bill," and that the appellant "permitted that to be done and acquiesced in the proceeding," and (2.) that assuming such knowledge and acquiescence on the part of the appellant not to be established, he must nevertheless be held to have adopted the bill charged on by reason of his failure to give information to the respondents that his signatures were forged, after receipt of the notices sent by them in July, 1879.

The first ground of judgment assigned by the learned Lords constituting the majority appears to me to negative the idea of forgery. I cannot conceive that John Fraser, the drawer of the bill, by whom the signatures of the appellant were admittedly written, can be held thereby to have committed the crime of forgery according to the law of Scotland, if these signatures were written and used by him, as their Lordships hold it to be proved that they were, with the permission and acquiescence of the appellant. And it does seem a strange thing that in the interlocutor under appeal the respondents are found entitled to costs, but, "subject to deduction of any expense that may have been caused to the complainer (appellant) by the respondent's denial of the averment of forgery."

But it is unnecessary to dwell upon these matters, because I agree with your Lordships, that neither of the views taken by these learned judges is well founded, and consequently that the judgment of the First Division must be reversed.

Since the conclusion of the argument at your Lordships' bar I have carefully perused the whole proof led by the parties; and *the opinion which I have formed upon [107 the facts of the case is precisely the same with that which has been already expressed in the court below by Lord Adam (the Lord Ordinary) and by Lord Shand. The real question arising upon the proof appears to be whether the account

given by the appellant, on the one hand, or that given by John Fraser, the forger, and his father, on the other, is to be accepted as true. In estimating the relative weight of their conflicting statements it is of course necessary to take into account the whole facts and circumstances of the case established by evidence independent of the testimony of these three witnesses, and also to consider the degree of probability attaching to their respective statements. Giving due effect to these considerations I have come to the conclusion that the account given by Duncan M'Kenzie, the appellant, is to be believed, and that the contradictions of his statement which are to be found in the evidence of the forger and his father John Fraser, senior, are unworthy of credit. When testimony is directly conflicting, and the question at issue depends upon the credibility of certain witnesses, it is undoubtedly advantageous to have an opportunity of noting the demeanor of these witnesses whilst they are under examination; and the Lord Ordinary had that advantage in the present case. At the same time I should not be inclined to accept the opinion of the Lord Ordinary on that account, unless the opposing testimonies came to a very even balance. In the present case the weight of testimony appears to me, irrespective of the Lord Ordinary's opinion on that point, to be on the side of the appellant; but it is nevertheless satisfactory to my mind that the judge before whom the witnesses were examined expresses his unhesitating belief that the appellant "gave a substantially true account of the various transactions which took place with reference to the bills."

Having arrived at that conclusion I do not think it necessary to criticise the evidence in detail. For reasons, some of which appear in the opinion of Lord Shand, and others of which have been assigned by your Lordships to-day, I am quite unable to concur in the view of the facts which was taken by the Lord President, as I understand with the approval of his brethren Lord Deas and Lord Mure.

108] *I therefore pass at once to the second ground of judgment, the alleged adoption of the forged bill by the appellant. The facts material to this part of the case, which I hold to be instructed by the evidence, and which the majority of the First Division assumed as the alternative of their own view being negatived, appear to be these:

(1.) That on the 14th of April, 1879, the appellant came to know that his signature, as drawer and indorser of a bill for £76, discounted with the respondents' bank, had been forged by John Fraser, grocer, Inverness, the drawer—that, the forged bill was then delivered to him by the forger; and

that the appellant was informed and believed that the bill had been paid in cash.

(2.) That the bill had not been so paid but was retired by the forger paying £6 in cash and handing the bill charged on to the bank.

(3.) That on the 14th of July, 1879, written notice was sent to the appellant that the £70 bill drawn by him on John Fraser would mature on the 17th, and lay at the bank office for collection; and that on the 18th of July a further notice was sent, giving the particulars of the bill, and intimating that it had been protested for non-payment.

(4.) That on the 21st of July, 1879, the local agent of the respondents wrote the appellant intimating that, unless the bill was forthwith paid by him, it would be placed in the hands of their law agent; and that on the 25th of July the law agent intimated by letter to the appellant that proceedings would be taken against him if he did not pay the bill before the 28th of July.

(5.) That on receipt of the first notice of the 14th of July, the appellant had good reason to know, and was in point of fact aware, that his signature had been again forged by John Fraser: and that on receipt of the second notice he went to Inverness, informed Mr. McGillivray, a solicitor there, of the fact, and instructed McGillivray to take steps to protect him against the consequences of the forgery.

(6.) That on the 29th of July, 1879, McGillivray informed Mr. Ross, the law agent of the bank, that the appellant's signature was forged: and that two days thereafter the appellant and John Macdonald, whose name was also on the bill, as a drawer and indorser, called together upon [109 Mr. Williamson, the respondents' branch agent, and told him that their signatures were forged.

It is not suggested that there was any change in the position of the bank betwixt the date of the first notice given to the appellant on the 14th of July and the 29th of July, when the respondents were informed of the forgery: and it cannot therefore be alleged that the respondents have sustained any loss or prejudice by his silence during that period. But the three learned judges, composing the majority of the First Division, have nevertheless held that such silence is, in the circumstances above narrated, sufficient, according to the law of Scotland, to infer adoption of the forged bill by the appellant. I am unable to concur in that judgment, it being my clear opinion that the right view of the case was taken in the court below by Lord Shand and the Lord Ordinary.

The question whether a forged bill has or has not been adopted by the person whose signature is forged, is in reality an issue of fact and not of law. Still, adoption of a bill may be matter of legal inference from certain ascertained facts; and in the present case the inference which has been drawn by the court below, adversely to the appellant, appears to depend upon the fact, that after he came to know in July that the second bill had been discounted with the bank, he (the appellant) kept silence, or at least did not inform the bank of the forgery of his own name until a fortnight or there-by had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman v. Cooke* (*). It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information.

[110] *I do not think that the Scotch cases which have been cited at the bar bear out the proposition that silence, in circumstances such as occur in the present case, is *per se* sufficient to imply adoption of a forged bill. I shall now, before concluding, shortly refer to those cases in the order of their dates.

Maiklem v. Walker (*) was a case in which two brothers, who lived together, were in the year 1828 charged jointly to make payment of a bill upon which both their names appeared. A considerable time after the charge was given the goods of A., one of the brothers, were arrested, whereupon A. immediately brought a suspension of the charge and diligence, alleging then for the first time that his signature to the bill had been forged by his brother B., who in the meantime had absconded. The court held that A. had made himself liable to pay the forged bill, and refused the suspension, Lord Gillies observing, "Is he to be allowed to acquiesce until the proper debtor makes his escape out of the country, and then to come forward and allege he has incurred no liability to the holder of the bill."

(*) 2 Exch., 654; see note, *ante*, p. 87. (*) Court of Sess. Cas., 1st Series, vol. xii, p. 53.

In *Findlay v. Currie*⁽¹⁾ the question was one of relevancy: and all that the court decided was that the charger had made averments sufficient to entitle him to a counter-issue of adoption, in order to meet the issue of forgery taken by the suspender. The substance of the charger's averments was that after notice to him of the bill said to be forged and a demand for payment, the suspender had an interview with the charger's agents, when he was shown the bill and did not deny his signature; that at a subsequent interview the suspender did not deny his signature, but "begged for time to see the bill," which was granted. In the meantime his brother, the alleged forger, absconded, and he then for the first time denied the authenticity of his subscription to the bill.

Boyd v. The Union Bank⁽²⁾ was a decision upon the record, holding the charger's allegations of adoption to be irrelevant. The only allegation of the charger was to the effect that, although the bill was, during its currency, intimated to the suspender, he *kept silence and did not in- [lll] form the bank that his signature was a forgery. In that case the Lord President (Lord Colonsay) said: "when a party is shown a bill and makes no objection, and allows the creditor to remain in the belief that it is his signature, he has incurred a ground of liability through the loss incurred by that adoption. That principle might apply even though he was not shown the bill which is the subject of discussion. If he had allowed the matter to lie over, and through his silence the whole was lost, an obligation might be incurred through that silence."

The case of *Warden v. The British Linen Company*⁽³⁾ is a decision to precisely the same effect as the preceding. The court then refused to grant a counter-issue of adoption by two co-acceptors, both of whom alleged that their signatures to the bill were forged, upon the bare averment that they had taken no notice of a letter addressed to them by the bank, informing them of the existence of the bill, before it was due.

In the next case, that of *Brown v. The British Linen Company*⁽⁴⁾, the court sustained the relevancy of the charger's averments and allowed a counter-issue of adoption. These averments were that the bill was intimated during its currency to the person alleging forgery,—that thereafter

⁽¹⁾ Court of Sess. Cas., 2d Series, vol. xiii, p. 278.

⁽²⁾ Court of Sess. Cas., 2d Series, vol. xvii, p. 159.

⁽³⁾ Court of Sess. Cas., 3d Series, vol. i, p. 402.

⁽⁴⁾ Court of Sess. Cas., 3d Series, vol. i, p. 793.

his agent, acting under his instructions, called at the bank and examined the bill,—that the agent did not state that his employer's signature was forged, but on the contrary, requested that the bank should send him an intimation when the bill fell due, and moreover gave the bank agent to understand that if the bill was not paid at maturity by Walker (the alleged forger) his client wished it to be renewed.

None of these decisions appear to me to give the least support to the doctrine that mere silence, after intimation, or even after demand for payment of a forged bill, necessarily implies adoption of a bill by one whose subscription to the bill is a forgery; and accordingly the Solicitor-General for Scotland, towards the close of his argument, mainly relied upon the case of *Urquhart v. The Bank of Scotland* which was decided by the First Division of the court in the year 1872⁽¹⁾.

[112] *The case of *Urquhart v. The Bank of Scotland* ⁽¹⁾ is not noticed in the regular reports, and is only to be found in the *Scottish Law Reporter*. The facts established by the proof in that case, as they are detailed in the report, were somewhat peculiar. It was proved that the suspender's signature to the bill charged on was forged: but it was also proved that notice of protest of the bill for non-payment was received by him on or about the 2d of August, 1871, and that he wrote to the bank on the 23d of August that his signature was a forgery, his friend and intimate, the forger, having in the meanwhile absconded. It was proved that the forger was subsequently tracked out and apprehended under a criminal warrant: and it was also proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June, 1870, he had given the forger money to retire one of those bills known by him to be forged. It is no doubt the case that the terms of the Lord Ordinary's interlocutor and of the judgment of the Inner House, as reported, lay great stress upon the silence of the suspender as warranting their decision, which was against him. But there were obviously many grounds for the decision other than his silence, and I think it must be assumed that the judgment proceeded upon the whole circumstances of the case and not upon silence alone. All I can say is, that if these grounds were in the view of the court, the case was in my opinion well decided. But

⁽¹⁾ 9 Scot. Law Rep., 508.

if it was intended by the court to rest their judgment upon the mere silence of the suspender apart from other circumstances, which I greatly doubt, then, whilst agreeing in the result at which their Lordships arrived, I should be of opinion that the decision was not only unnecessary but erroneous.

LORD SELBORNE, L.C.: My Lords, before putting the question, it may be right to refer to the position in which the appellant stands as suing here *in forma pauperis*. I see that by the interlocutor, which your Lordships will reverse, expenses were given to the respondents. Of course that will be put right, and that interlocutor will be discharged; *and the appellant will have those ex- [113] penses in the court below. With regard to the costs in this House, the costs must be given in accordance with whatever is the general rule in the case of an appellant being successful who appears here *in forma pauperis*.

Ordered and adjudged, that the interlocutor of the Lords of Session in Scotland, of the First Division, of the 4th of June, 1880, complained of in this appeal, be, and the same is hereby reversed, and that the interlocutor of the Lord Ordinary of the 3d of February, 1880, be, and the same is hereby restored: *And it is further ordered*, that the respondents do pay or cause to be paid to the appellant the costs following upon the reclaiming note in the court below, and such costs in this House as have been incurred by the appellant in appearing *in forma pauperis*, the amount of such last-mentioned costs to be certified by the clerk of the Parliaments.

Lords' Journals, 11th February, 1881.

Agent for appellant: *A. Beveridge*.

Agent for respondents: *W. A. Loch*.

See 12 Eng. Rep., 877 note; 8 Alb. L. J., 385; Wharton on Agency, §§ 71-3.

The ratification of the signing of a bond by an obligor whose signature was forged, does not render him liable thereon, there being no new consideration: *McHugh v. County of Schuylkill*, 67 Penn. St. R., 391, 5 Amer. R., 445, 447 note.

The forgery of the indorsement of a promissory note is an act incapable of

ratification by the person whose name is forged, that act being criminal and opposed to public policy: *Shister v. Vandyke*, 92 Penn. St. R., 447, 8 Week. Notes (Penn.) 234, 37 Am. R., 702, 704 note.

Where the signature of the maker of a promissory note was a forgery, but after dishonor the alleged maker had said that it was his signature, and had acted similarly as to a previous forged note held by the same holder: *Held*,

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that there was no ratification or estoppel: *Kernan v. London, etc.*, 4 Victorian L. R. (Law), 279.

The mere promise by the supposed maker to pay a forged note, without any consideration, and without any new consideration, and without circumstances creating an estoppel, against the promisor, does not create a binding contract to pay such note. The principle of agency by which a principal may ratify the unauthorized act of his agent, does not apply to the alleged ratification of a forged note; the act of the agent being voidable may be ratified; the act of the forger is void and cannot be ratified: *Workman v. Wright*, 33 Ohio St. R., 405, 31 Amer. R., 546, 549 note.

A son carried to bankers, of whom he as well as his father was a customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it was lying at the banker's dishonored. He seemed to have communicated the fact to his son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it: the bankers insisted (though without any direct threat of prosecution) on a settlement, to which the father was to be a party; he consented and executed an agreement to make an equitable mortgage of his property. The notes with the forged indorsements were then delivered up to him. Held, that the agreement was invalid. A father, appealed to under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though he is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes is not enforceable in equity: *Williams v. Bayley*, L. R., 6 H. L., 200.

The defendant's name was forged, by one Richard Jones, to a joint and several promissory note for £20, dated the 7th of November, 1869, and purporting

to be made in favor of the plaintiff by the defendant and Jones. While the note was current the defendant signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority: "I hold myself responsible for a bill dated the 7th of November, 1869, for £20, bearing my signature and Richard Jones' in favor of Mr. Brook [the plaintiff]." At the trial of an action against the defendant on the note, the judge ruled that this memorandum was a ratification, and directed the jury that the only question for them was whether the defendant signed it. It being admitted that he did, a verdict was entered for the plaintiff.

Held (per Kelly, C.B., Channell and Pigott, Martin, B., dissenting), a misdirection.

Per Kelly, C.B., Channell and Pigott, BB., that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void, and incapable of ratification; but that it was, in fact, an agreement by the defendant to treat the note as his own, in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on an illegal consideration.

Semle, that the memorandum being ambiguous in its terms, it should have been left to the jury to say what its real meaning was when looked at in connection with the circumstances under which it was signed: *Brook v. Hook*, L. R., 6 Exch., 89; S. C., 3 Alb. L. J., 277.

If an intestate's name has been forged, or signed to a promissory note by an unauthorized person, it does not follow that his estate is liable thereon, upon proof of his recognition of the same and promise to pay. The ratification in such a case must be made with a full knowledge of the facts affecting the party's rights: *Gleason v. Henry*, 71 Ill., 109.

Where the execution of a note is denied, the onus is on plaintiff to show its execution by defendant, or his ratification of it with full knowledge of the facts: *Cravens v. Gillilan*, 63 Mo., 28; *First National Bank v. Gay*, 63 Id., 33.

One whose name is forged as maker,

to a promissory note, may bind himself as such, by an unwritten ratification of the signature as his own, made after delivery of the note: *Howard v. Duncan*, 3 Lans., 174; *Thorne v. Bell*, *Lalor's Sup.*, 480; *Union Bank v. Mott*, 33 Conn., 95.

One whose signature has been attached to a note without his authority may ratify the signature; and no new consideration is necessary to validate the ratification: *Cravens v. Gillilan*, 63 Mo., 28; *First National Bank v. Gay*, Id., 33.

One who knowing the signature to a promissory note to be forged and intending to be bound by it, acknowledges it as his own, assumes the note as his own, and is bound by it just as if it had been originally signed by his authority: *Wellington v. Jackson*, 121 Mass., 157.

The recognition, as genuine, of a forged signature of the party paying, bars an action to recover back the money paid: *Lewis v. White's Bank*, 27 Hun, 396, 15 N. Y. Weekly Dig., 127.

In an action upon a promissory note, it is not competent to show that the defendant was estopped from setting up the defence of forgery to the note in suit, by proving that he had paid other forged notes or recognized them to be valid: *Cohen v. Teller*, 93 Penn. St., 123.

Neglect to prosecute for the unauthorized use of one's name on negotiable paper, does not estop one from denying his liability on similar paper made thereafter, nor make the offender a general agent to make and negotiate such paper.

The recognition of paper on which one's name has been used without authority, may be shown as tending to show an implied authority to make such paper afterwards.

Joint relations as partners, or otherwise, will not give one any implied authority to authorize the use of another's name as maker or indorser, where their apparent interests or legal obligations might be different: *Stroh v. Hinchman*, 37 Mich., 490.

Where the defence was forgery in a suit upon a note, it was competent to show that the indorser recognized the note with its indorsement as valid, and that this fact was communicated to the

plaintiff, who bought the note upon the faith of it: *Cohen v. Teller*, 93 Penn. St. R., 123.

In a suit upon a promissory note, one of the makers, by his plea, verified by affidavit, denied the execution of the note by him. The proof showed that, by his admissions and declarations, the note was "all right," and that if the plaintiff would "hold still," he would pay him, he knowingly and designedly induced the plaintiff to omit taking measures to collect the same of the other maker when he was solvent, until after he left the country. Held, that by these acts and assurances he was estopped from denying the fact of his execution of the note: *Hefner v. Dawson*, 63 Ills., 403; *Hefner v. Van Dolah*, 57 id., 520.

Facts and circumstances which held (per Lord Adam, Ordinary, and diss. Lord Shand) to amount to adoption of a bill of exchange by a person whose signature had been forged as drawer and indorser thereon.

Opinion (per Lord Deas), that a person in knowledge that his signature to a bill had been forged, was both morally and legally bound to inform the bank of the fact.

Opinion (per Lord Shand), that the duty of disclosure was in each case a question of circumstances; and that something active was necessary to constitute adoption over and above mere silence, however obstinate: *Mackenzie v. British Linen Co.*, 17 Scot. Law Repr., 619.

In May, 1873, H., B. & Co., being indebted to plaintiffs' bank \$60,000, B. executed a mortgage for \$40,000 as security therefor, reciting that it was for money lent on notes made by B. and indorsed by the firm, by defendant and by Mrs. P. In October the indebtedness having increased to \$90,000, the bank required, as further security, a mortgage from the defendant for \$25,000, and one from Mrs. P. for a like amount. The mortgages were similar in form, and recited that the firm's indebtedness being for moneys previously advanced on promissory notes made and indorsed, as before stated, exceeded \$25,000, and that such mortgage was given as collateral security for that sum, part of said indebtedness, whether represented by the notes then under discount or by renew-

als, or by substitutions therefor, and similarly made and indorsed.

There was a covenant for the payment of the indebtedness represented by said notes when due, or by any renewals or substituted notes. B. had been signing defendant's and Mrs. P.'s names as indorsers to the notes with their consent, as he alleged, but which defendant denied; and to prevent the bank noticing any difference between the signatures to the notes and to the mortgage, B., with defendant's assent, signed defendant's and Mrs. P.'s names to the mortgages, which they subsequently acknowledged before a witness to be their signatures.

Defendant alleged that he then believed the indebtedness to be only \$60,000, being told so by B., but about three weeks after he discovered it to be \$90,000, and he then said nothing to the bank about it. After the mortgages were executed, the notes were renewed from time to time, down to the insolvency of the firm in 1877, by B. writing defendant's and Mrs. P.'s names as indorsers, as he stated, with their consent, but which defendant denied. The bank brought actions respectively against defendant personally and as executor of Mrs. P., who had since died, on the covenant in the respective mortgages, and also on the indorsements. After action commenced, the bank realized \$35,000 on B.'s mortgage, and \$6,800 from the firm's estate.

The jury found that defendant did not authorize B. to indorse for him, and that defendant, when he gave the mortgage, supposed the debt to be only \$60,000.

Held, that the evidence showed that each mortgage was intended to be an independent security for \$25,000; and that the finding of the jury that the defendant supposed the debt to be \$60,000, was wholly immaterial, as the mere fact that he thought it was only that amount could not, under the circumstances, relieve him from liability upon the mortgage, either wholly or partially: *Merchants, etc., v. Bostwick*, 8 Upper Can. App. R., 24.

In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty.

Held, reversing the judgment of the county court, that no inference could be drawn from this as an admission by the defendant of his liability for the plaintiff's wages.

Held, also, affirming the judgment below,

1. That the statements made by L. & M., under the circumstances set out in the case, were properly received.

2. That it was allowable to prove by persons working with the plaintiff that they had been paid by the defendant on application to him, and that in suits brought by them against him he had paid money into court; and that the judgments in such suits were also admissible, though unnecessary.

3. That a memorandum in defendant's writing, unsigned and attached to a bill of sale relating to the timber, was also admissible: *Stewart v. Scott*, 27 Up. Can. Q. B., 27.

[6 Appeal Cases, 114.]

H.L. (Sc.), Feb. 17, 1881.

[HOUSE OF LORDS.]

***CALEDONIAN RAILWAY COMPANY, *Appellants*; [114
NORTH BRITISH RAILWAY COMPANY, *Respondents* (').**

Statute 42 & 43 Vict. c. 155, ss. 3, 6 (Local)—Construction—Railway—Commencement of Payment.

The Caledonian Railway Company for thirteen years up to July, 1879, had been proprietors of the D. and A. Railway, and had incurred certain liabilities in respect to payment of dividends to preference and ordinary shareholders of the D. and A. line. The preamble of the North British Railway (D. and A. Joint Line) passed July, 1879 (42 & 43 Vict. c. clv.), set forth that it was expedient that the Caledonian and North British Companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the D. and A. line. Sect. 3 provided that on and after the 1st of February, 1880, called the "vesting period," all interest which the Caledonian possessed should be transferred to the Caledonian and North British jointly and in equal proportions in manner hereinafter provided by the act. Section 6 provided that the consideration for the transfer of the joint line shall be as follows: "(1.) From and after the vesting period the company (the North British) shall pay to the Caledonian Railway Company half-yearly on the 1st of March and 1st of September in each year a sum equal to one-half of the aggregate of the following half-yearly payments, for which the Caledonian Railway Company are now liable in respect of their acquisition of the D. and A. Railway."

The Caledonian Railway Company claimed that under this section there was a half-yearly payment amounting to £5,903 15s. due on the 1st of March, 1880:

Held, affirming the decision of the court below, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the first of February, 1880.

Per LORD SELBORNE, L.C.: The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

(') Affirming Court Sessions Cas., 4th Series, vol. 7, p. 1147, 17 Scot. L. Repr., 777.

Statutes must be expounded according to the meaning, and not according to the letter: *Pillow v. Bushnell*, 5 Barb., 156; *People v. N. Y. Cent.*, 13 N. Y., 78, 80.

If any words are obscure or doubtful, the intention of the legislature must be resorted to in order to find their meaning, and, when ascertained, must be followed with reason and discretion: *James v. Patten*, 6 N. Y., 9.

The spirit of a law may be referred to in order to interpret words admitting of two meanings, but not to extend a law to a case not within its fair meaning: *Beebe v. Griffling*, 14 N. Y., 235.

In construing a statute, all its provisions must be taken into considera-

tion, and not any separate section or part of a section: *People v. Gaul*, 44 Barb., 97.

The intention of the lawgiver is to be deduced from a view of the whole and every part of a statute, compared together. The real intention, when actually ascertained, will always prevail over the literal: *People v. Draper*, 15 N. Y., 582.

While it is the duty of courts, in construing statutes, to give effect to the intent of the law-making power, and to seek for that intent in every legitimate way, yet it is to be sought, first of all, in the words and language employed, and if the words are free from ambiguity, express clearly the sense of the

framers, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and, when the words have a definite and precise meaning, to go elsewhere in search of conjecture, in order to restrict or extend the meaning. The natural and obvious meaning should be taken without resorting to subtle and forced construction. Courts cannot correct supposed errors, omissions, or defects. The office of interpretation is to bring a sense out of the words, not to bring a sense into them: *McClusky v. Cromwell*, 11 N. Y., 598; *Chamberlain v. Western*, etc., 45 Barb., 220.

Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. Where any words are obscure or doubtful, the intention of the legislature is to be resorted to, in order to find the meaning of the words. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers: *The People v. Utica Ins. Co.*, 15 John., 857, 379; *West v. McGwin*, 43 Barb., 200-1; *Mangum v. Farrington*, 1 Daly, 240; *Jackson v. Collins*, 3 Cow., 89; *Holmes v. Carley*, 31 N. Y., 289-291; *Chase v. N. Y. Cent.*, 26 id., 523.

Therefore, in cases of remedial statutes like this, when it is obvious that a special remedy was designed to be given to a particular class of persons in certain cases, it is the duty of courts to apply a liberal and equitable rule of construction, even though the construction put upon the statute be contrary to the letter of it. (*Dwarris on Stat.*, 718.) A thing within the letter of the statute is not within the statute, unless it be within the intention of the makers. (*The People v. Utica Ins. Co.*, 15 Johns. R., 358, 379; *Jackson v. Col-*

lins, 3 Cowen, 89): *Mangum v. Farrington*, 1 Daly, 236, 240.

Statutes that are remedial, and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent the failure of the remedy. They are to be construed liberally, and *ultra*, not *contra*, to the strict letter. (*Smith's Com. on Statutes*, etc., § 480; *The People v. The Utica Ins. Co.*, 15 John., 850.) Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute.

"A thing that is within the intention of the maker of a statute is as much within the statute as if it were within the letter. And such construction ought to be put upon it as does not suffer it to be eluded. (*Smith's Com. on Stat.*, etc., § 464.) If there happens to be omitted in a law anything that is essential to it, or is a necessary consequence of its disposition, and that tends to give the law its entire effect according to its motive, we may in this case supply what is wanting in the expression, and extend the disposition of the law to what is included within its intention, although not expressed in words." (1 *Kent's Com.*, p. 463.) Whenever a power is given by a statute, everything necessary to the making it effectual, or requisite to attain the end, is implied. (Id.) "Several statutes in *pari materia* and relating to the same subject, are to be taken together and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system, and the rule applies, though some of the statutes may have expired and are not referred to in the other acts. (*Smith's Com.*, § 338.) So too, when one statute was undoubtedly under the consideration of the legislature when passing another, the former

ought, although long since repealed, to be taken in consideration in construing the latter statute, and that for the reason that it is a rule in the construction of statutes that all which relate to the same subject, notwithstanding some

of them may have expired or are not referred to, must be taken *to be one system* and construed consistently, and the practice has always been so." (Id., §§ 639, 640): *West v. McGwin*, 43 Barb., 200-1.

[6 Appeal Cases, 143.]

J.C.*, Nov. 17, 18, 1880.

[PRIVY COUNCIL.]

***HER MAJESTY'S ATTORNEY-GENERAL FOR BRITISH HONDURAS, *Appellant*; and JOHN BRISTOWE and CHARLES THOMSON HUNTER, *Respondents*.** [143]

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

British Honduras—Territorial Sovereignty—Adverse Possession against the Crown.

Held, in an information of intrusion relating to land in British Honduras, that the defendants having shown sixty years' adverse possession there from before 1817, by themselves and their predecessors in title, without disturbance or effectual claim by the Crown, such information must be dismissed.

Although British Honduras was formally declared to be a British colony, and formally annexed to British dominions by a proclamation of Her Majesty, dated the 12th of May, 1862, yet grants of land having been made therein by the Crown as early as 1817; *held*, overruling the opinion of the Supreme Court, that the territorial sovereignty of the Crown must be deemed to have been acquired in or before that year.

* *Present*:—SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

[6 Appeal Cases, 156.]

J.C.*, Nov. 25, 26, 1880.

[PRIVY COUNCIL.]

156] *SIMMONS, *Appellant*; and MITCHELL, *Respondent*.ON APPEAL FROM THE COURT OF APPEAL FOR THE WINDWARD ISLANDS
(GREENADA).*Pleading—Action for Slander—Innuendoes—Prefatory Averment.*

Words merely conveying suspicion will not sustain an action for slander.

Where such words admit fairly, and in their natural sense, of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury.

The innuendoes not declaring that the words were spoken with the intention of imputing to the plaintiff a felony, and not importing to enlarge the meaning of those words:

Held, that the prefatory averments which only professed to give the motives of the defendant could not be substituted for those innuendoes whereby the plaintiff undertook to give the meaning of the words spoken.

APPEAL from a judgment of the Court of Appeal for the Windward Islands (Oct. 27, 1879), dismissing an appeal
157] from a *judgment of the Supreme Court (Civil Jurisdiction) of Grenada (May 27, 1879), discharging with costs a rule *nisi* for a new trial which had been obtained by the appellant in an action brought by him against the respondent.

The pleadings and facts are set forth in their Lordships' judgment.

Mr. J. D. Fitzgerald, for the respondent, raised the preliminary objection that the appeal had lapsed, and that no order for special leave had been made, the appellant's petition for that purpose having been ordered to stand over till the hearing. He relied on the Order in Council of the 3d of May, 1859, constituting the Court of Appeal for the Windward Islands, which provides for appeals to Her Majesty in Council "from any final judgment, decree, order, or sentence of the said Court of Appeal . . . in case any such judgment, decree, order or sentence shall be given or pronounced for or in respect of any sum or matter at issue, above the amount or value of £300 sterling, or in case such judgment, decree, order, or sentence shall involve, directly or indirectly, any claim, demand, or question to or respecting property in any civil right amounting to or of the value of £300 sterling. . . . And that in all cases security shall also be given by the party or parties appellant in a bond or mortgage, or personal recognizance, not exceeding the value of £500, for the prosecution of the ap-

**Present*:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

peal and for the payment of all such costs as may be awarded to the party or parties respondent, and that such security be completed within twenty-eight days from the date of the motion or petition for leave to appeal; and the party or parties appellant shall then, and not otherwise, be at liberty to prefer and prosecute his, her, or their appeal." He contended that the present case was within the words of the Order in Council, the declaration having claimed £5,000 damages, that no special leave to appeal was necessary, and that security for costs not having been given within twenty-eight days, or at all, as required by the Order in Council, the appeal had lapsed. He further contended that no special leave ought now to be given, the petition for special leave having been presented on the ground that the case was not within the Order in Council, and the fact that no security for costs had been given *not having been [158 stated to their Lordships at the time. He cited *Sibnarain Ghose v. Hullodher Doss* (*); *Bulkeley v. Scutz* (*).

Mr. J. McLeod, for the appellant, contended the case was not within the Order in Council, it being an action of tort, and the claim for damages in the declaration not being "a matter at issue"; and that even if the case were within the Order in Council, special leave ought then to be given, security having been lodged in the registry since the presentation of the petition for special leave. He then cited *Mayor v. Burgess* (*).

SIR ROBERT P. COLLIER: Their Lordships are of opinion that the case is within the Order in Council, and that security for costs ought to have been given within twenty-eight days from the date of the motion for leave to appeal in the court below, but as they think a *bona fide* mistake was made by the appellant, they will now give special leave to appeal.

Mr. Meadows White, Q.C., and Mr. J. McLeod, for the appellant, contended that the words alleged in the declaration and proved at the trial, were not words of mere suspicion, but that the natural meaning of them was to impute the guilt of murder to the appellant. The intention of the respondent in using them was a question for the jury. The question of the meaning was a question for the jury, and ought to have been submitted to them. The innuendoes were immaterial in this case: see Common Law Procedure Act, 1852, s. 61; Rules Trinity Term, 1853, r. 16. Reference was made to *Watkin v. Hall* (*); *Hart v. Wall* (*).

(*) 9 Moo. P. C. 354. (*) 6 Moo. P. C. (N.S.), 481. (*) 24 L. T. (N.S.), Q. B., 67.

(*) Law Rep., 3 Q. B., 402. (*) 2 C. P. D., 146; 20 Eng. R., 421.

The words used reasonably bore the construction put upon them by the appellant, and a reasonable man to whom they were addressed would infer liability to an indictment for murder. [SIR MONTAGUE E. SMITH: The judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two 159] meanings was intended.] Reference was made *to *Hunt v. Goodlake* ('); *Sturt v. Blagg* ('); *Mulligan v. Cole* ('); *Heming v. Tower* ('); *Tozer v. Mashford* ('); Fol-kard's Treatise on Slander, p. 93; *Tempest v. Chambers* ('); *Padmore v. Lawrence* (').

Mr. J. D. Fitzgerald, for the respondent, contended that the words used amounted at most to words of mere suspicion, and did not convey any positive or absolute imputation or charge of an indictable offence. Reference was made to 2 Selw. N. P., 1200; *Snag v. Gee* ('); *Jackson v. Adams* ('); *Harrison v. King* ('); *Tozer v. Mashford* ('). No prefatory statement is now necessary, only an innuendo. If an innuendo is necessary at all, as it is in this case, it must be used, the Common Law Procedure Act has made no difference. Where it is not wanted it can be rejected, but where necessary its absence or insufficiency is fatal. Reference was made to Common Law Procedure Act, 1852, s. 61; Chitty on Pleadings, vol. i, pp. 415, 422 [7th ed.]; *Rawlings v. Norbury* ('); *Cox v. Cooper* ('). The words do not naturally impute an indictable offence, and are not actionable *per se*, and therefore no innuendo would make them so. Words are *prima facie* to be construed according to their ordinary sense: *Hankinson v. Bilby* ('); *Daines v. Hartley* ('); *Capital and Counties Bank v. Henty* ('). Even if there were a cintilla of evidence to go to the jury, a new trial would not be ordered unless on the evidence there should have been a different result. The defendant, under the circumstances, was entitled to one month's written notice of action: see Grenada Act, No. 148. The declaration alleged that the respondent was acting as clerk of the Crown, and therefore he was a public officer within the meaning of

(') 43 L. J. (N.S.), C. P., 54.

(') 10 Q. B. (N.S.), 906.

(') Law Rep., 10 Q. B., 549; 44 L. J. (Q.B.), (N.S.), 153.

(') 10 M. & W., 564, 569.

(') 6 Ex., 539; 20 L. J. (N.S.), (Ex.), 225.

(') 1 Stark., 67.

(') 11 Ad. & E., 380.

(') 4 Rep., 16 a.

(') 2 Bing. N. C., 402.

(') 4 Price, 46.

(') 1 F. & F., 341.

(') 12 W. R., 75.

(') 11 M. & W., 442.

(') 3 Ex., 200.

(') 28 W. R., 351

the act. [SIR BARNES PEACOCK: The words were not spoken or the act done in his capacity of clerk to the Crown.]

*Mr. *White* replied.

[160]

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: In this case an action for slander was brought by Mr. Charles Simmons, the appellant, against Mr. Mitchell, the respondent, in the Supreme Court of Grenada. The Chief Justice, who tried the case, having offered the plaintiff a nonsuit, which he declined, directed the jury to find a verdict for the defendant. A rule having been granted to show cause why that verdict for the defendant should not be set aside and a new trial had, the Chief Justice adhered to his ruling and discharged the rule. Whereupon there was an appeal to the appellate court of the Windward Islands, consisting of four chief justices. The appellate court was equally divided, and therefore the judgment of the chief justice stood discharging the rule for a new trial. These are the circumstances under which this appeal comes before their Lordships.

The declaration was in respect of words alleged to be slanderous uttered by the defendant, Samuel Mitchell, who is described as the clerk of the Crown, and having reference to the plaintiff, who is a merchant in Grenada. The declaration contains a prefatory statement that the defendant, "being clerk of the Crown, and, as such, having the control and custody of depositions and other proceedings taken at the inquisitions of coroners in and for the said island of Grenada, and contriving and intending to injure the plaintiff, and to cause it to be believed that he had been guilty of murder, and to subject him to the pains and penalties by the law made and provided against and inflicted upon persons guilty thereof," used the words complained of. The declaration contains four counts, and this prefatory averment is applicable to each of them. The words set out in the first count are these: "'People who go to the Secretary of State had better see that their characters are clear, for your brother' (meaning the plaintiff)"—the words being addressed to the brother of the plaintiff—" 'lies here' (meaning the office or place of business of the Colonial Secretary of the said island and clerk of the Crown) 'under suspicion of having murdered a man named Emanuel Vancrossen at the Spout some years ago'"—and this is the innuendo—"meaning thereby that there was among the records of the said clerk of the Crown some documentary evidence [161] or charge implicating the plaintiff with the murder of the

said Emanuel Vancrossen at the Spout, and which warranted the defendant in saying so." The second count alleges the use of the same words with a somewhat different innuendo, the innuendo being, "meaning thereby that there was some evidence in the said office of clerk of the Crown that the plaintiff had murdered Vancrossen." The third count alleges the speaking of these words: "'Haven't you' (meaning the person with whom the defendant then conversed) 'heard that Charles Simmons' (meaning the plaintiff) 'is suspected of having murdered one Vancrossen, his brother-in-law? A proclamation offering a reward for the apprehension of the murderer is now in my office' (meaning the office of clerk of the Crown), 'and there is only one link wanting to complete the case'"—and the innuendo is in these terms, "meaning thereby that there was some evidence in the office of clerk of the Crown, and that there was required only one link in the chain of such evidence to put the plaintiff upon his trial for the alleged murder of the said Emanuel Vancrossen." There is a fourth count alleging the speaking of these words: "'Some years ago Emanuel Vancrossen was murdered, and his body was found at American Point' (meaning a place usually known as the Spout, situate on the northern shore of the lagoon adjacent to the town of Saint George, in Grenada aforesaid). And upon being asked the question, 'What about it?' by the person with whom the defendant then conversed, the defendant then answered, 'Charles Simmons was the person suspected of having committed the deed' (meaning the murder of the said Emanuel Vancrossen). 'I' (meaning the defendant) 'have spoken to Orgias and Sheriff'"—meaning the doctor and the Attorney-General of the island—"about it." Such is the declaration, to which the plea is "Not guilty," only.

It is to be observed that the plaintiff does not in any of his innuendoes declare that the words of which he complains were spoken with the intention of imputing to him a felony; that is to say, the crime of murder. The innuendoes do not purport to enlarge the meaning of the words, and if the words themselves convey only suspicion the innuendoes do no more.

It has been argued on behalf of the defendant that since the 162] *Common Law Procedure Act, s. 61, has been passed, these innuendoes may be rejected and the prefatory averments may be substituted for them and treated as the real innuendoes; that is to say, that the prefatory words in the present case, "contriving to cause it to be believed that the plain-

tiff had been guilty of murder," may be treated as explaining the meaning of the slanderous words set out in each of the counts. But their Lordships think that, there being innuendoes in the declaration whereby the plaintiff undertakes to explain the meaning of the words spoken, he cannot substitute for them a prefatory averment which does not profess to give the meaning of the words spoken, but only the motives of the defendant.

But it has been further argued that these innuendoes may now be all rejected, and the declaration may be treated as if it contained none; and that being so, that the words complained of in the declaration are capable of two meanings in their fair construction: one, that the defendant meant that the plaintiff was suspected of having committed a felony; the other, that he had committed the felony, and therefore that the question of their true meaning ought to have been left to the jury. It has not been disputed that in point of law words merely conveying suspicion will not sustain an action for slander.

With respect to the first, second, and fourth counts, their Lordships have had no difficulty. The words in those counts convey in their natural and ordinary sense suspicion, and suspicion only, and, according to the law of this country, with respect to the policy of which we have nothing to do, would not support an action of slander. Their Lordships have had more doubt with respect to the third count, wherein it is said that the defendant used these expressions: "Haven't you heard that Charles Simmons is suspected of having murdered one Vancrossen, his brother-in-law? A proclamation offering a reward for the apprehension is in our office, and there is only one link wanting to complete the case." It has been argued with some force that these words are capable of bearing the meaning that the plaintiff is guilty of murder, but that the technical proof against him is not wholly complete. Undoubtedly, if the words had admitted fairly of two meanings, the one being an imputation of suspicion only, the other of guilt, it would have been proper to leave to the jury the sense *in [163 which they were uttered; but their Lordships have come to the conclusion that, taken in their natural sense, and without a forced or strained construction, they do not contain these two meanings, but only one, viz., that there was a case of strong suspicion, but of suspicion only, against the plaintiff, and are therefore unable to say that the learned judge was wrong in withdrawing the case from the jury. They have further to observe that, even if the learned judge had

left the case to the jury, a finding of the jury that the words imputed actual guilt would not have been satisfactory, and their Lordships would have deemed it their duty to send the case back for a new trial. Their Lordships observe, indeed, that, according to the judgment of two of the learned judges, the principal stress in the argument of the counsel of the plaintiff was laid upon an answer given by William Simmons, the brother of the plaintiff, to a question put to him in cross-examination, that he regarded the words as an imputation of the crime of murder; but their Lordships are of opinion that such a statement by a witness without any proof of surrounding circumstances or conduct leading to the inference which the witness drew that the words had some meaning different from their ordinary meaning, was not evidence on which the jury would have been justified in acting. In the case of *Daines and Braddock v. Hartley* (¹), it was expressly ruled in the Court of Exchequer that a witness could not be asked with respect to spoken words in a slander case, "What did you understand by those words?"

For these reasons their Lordships are of opinion that the order of the learned Chief Justice discharging the rule for a new trial was right, and they will humbly advise Her Majesty to make that order which the Court of Appeal of Grenada ought to have made, that is to say, an order affirming the judgment of the Chief Justice; but, considering all the circumstances of the case, and that the Court of Appeal has given no costs of the appeal, their Lordships are of opinion that in this case the appeal should be dismissed without costs.

Solicitors for the appellant: *Stocken & Jupp.*

Solicitors for the respondent: *Greig & Meikle.*

(¹) 3 Ex., 200.

[6 Appeal Cases, 164.]

J.C.*, Nov. 24, 25, 1880.

[PRIVY COUNCIL.]

***JOHN CLARK, *Plaintiff*; and G. H. D. ELPHINSTONE and W. H. ANDERSON, *Defendants*.** [164]

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon Ordinances, No. 8 of 1834, No. 22 of 1871—Adverse Possession—Acts of Ownership.

Ceylon Ordinances No. 8 of 1834, and No. 22 of 1871, require that a defendant should have had ten years' undisturbed and uninterrupted possession, meaning actual and not ideal possession, of land in dispute in order to be entitled to the benefit of such ordinances.

Although acts done upon parts of a district of land may be evidence of possession of the whole, yet as regards lands within a disputed boundary acts of ownership by either party outside the boundary are no evidence of title to the lands within it.

**Present:*—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

[6 Appeal Cases, 176.]

J.C.*, Jan. 19, 21, 22, 25, 1881.

[PRIVY COUNCIL.]

***In re ADAIR'S PATENT.**

[176]

Practice—Foreign Patents should be stated in Petition—Renewal of English Patent although Foreign Patent expired—Duty of Patentee as to Accounts.

Where a patentee, whether English or foreign, has obtained foreign patents, they should be stated to their Lordships and the fullest information afforded as to the profits thereof.

An English patent may be renewed though a foreign one has been taken out and allowed to expire.

A patentee should preserve the clearest evidence of everything which has been paid and received on account of the patent. Whether or not his remuneration has been adequate, his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term.

THIS was a petition of William Adair for a prolongation for seven years of his term for using his invention of "improvement in pumps," in respect of which he had obtained the usual letters patent on the 5th of April, 1867.

Mr. Kay, Q.C., and Mr. Chadwyck Healey, for the petitioner.

** Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Mr. *Aston*, Q.C., and Mr. *Lawson*, for the opponents.

Sir *H. James*, Q.C. (Attorney-General), and Mr. *A. L. Smith*, for the Crown.

After the evidence had been adduced,

Mr. *A. L. Smith* contended that, as a matter of practice, [177] the *petitioner ought to have mentioned in his petition that he had taken out foreign patents: see *Johnson's Patent* (*); *Pitman's Patent* (*); second, that as a matter of public policy, seeing that the foreign patents had expired, or were just about to expire, the patent ought not to be prolonged in this country: see *Normand's Patent* (*); and, thirdly, that the accounts were not satisfactory.

Mr. *Aston*, Q.C., also contended that the accounts were defective, and that the subject of the invention was not of a large and important character. He urged that the prolongation, if any, should be confined to the combination described in the specification and should not include the alleged improvements. [SIR MONTAGUE E. SMITH: We simply extend the patent as it is, if we extend it at all.]

Mr. *Kay*, Q.C., in reply, urged, as to the point of practice, that there was no strict rule of pleading applicable, nor were petitions required to be, and in this case had not been, settled by council. No one had been misled, for the objections stated the foreign patents, and all sales abroad had been brought into account. The rule that a patentee first obtaining his patent abroad had no claim after the expiry of his foreign patent to a prolongation of his English patent does not apply to an English subject who had first obtained his patent in this country: see *Hill's Patent* (*); *Betts' Patent* (*); *Poole's Patent* (*); *Johnson's Patent* (*). He further contended that on the evidence the accounts were satisfactory.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: In this case their Lordships agree that the patent is a meritorious and a useful one; and undoubtedly the patentee, his patent having been extensively infringed and he having been put to very large costs in maintaining it, costs which unfortunately he has [178] *been unable to recover, comes before their Lordships with a case entitled to their favorable consideration.

With respect to his remuneration their Lordships are by no means satisfied that he has been, considering all the circumstances, sufficiently remunerated; but before granting this application, they must be satisfied that the petitioner

(¹) Law Rep., 4 P. C., 79.

(²) Law Rep., 4 P. C., 84.

(³) Law Rep., 3 P. C., 198.

(⁴) 1 Moore's P. C. (N.S.), 258.

(⁵) 1 Moore's P. C. (N.S.), 49.

(⁶) Law Rep., 1 P. C., 518.

has subscribed to those conditions which have again and again been laid down as precedent to his obtaining a renewal of his patent, which, as has been many times declared, is a matter of favor and not of right.

In the first place, their Lordships have to observe that the petitioner, although stating in his petition that he had exhibited his invention in foreign countries and endeavored to push it there, makes no mention whatever of his having obtained several foreign patents, two of which have been allowed to expire. The rule has been again and again laid down that where a patentee, whether English or foreign, has obtained foreign patents, they should be stated to their Lordships.

Moreover, it may be material to ascertain the date of those patents, inasmuch as if the date was prior to that of the English patent, even in the case of an English invention and an English patentee, it would at all events be a serious question whether the patent should be renewed. But in more than one case it has been said that there may be cases in which the profits of a foreign invention may be properly taken into consideration. It is therefore necessary for an English as well as a foreign patentee to give their Lordships the fullest information upon that subject.

It has been indeed argued, on the part of the Crown and of the opponents, that the petitioner in this case, having taken out a foreign patent, although after the date of the English patent, and allowed it to expire, is thereby disentitled to a renewal; but upon examination of the cases it does not appear that any of them go the length of deciding that, with respect to an English invention and an English inventor, the mere taking out of letters patent in a foreign country and allowing them to expire, would be a reason for their refusal to renew the patent. In fact there are two cases—the case of *Betts* and the case of *Poole*—in which the *contrary has been held; their Lordships, therefore, [179 do not give weight to that objection; but they have now to come to the question of the accounts.

In *Betts'* patent, which has been before referred to, the rule with respect to accounts was there stated by Lord Chelmsford: "There can be no difficulty in a patentee beginning from the first to keep a patent account distinct and separate from any other business in which he may happen to be engaged. He knows perfectly well that if his invention is of public utility and he has not been adequately remunerated, he will have a claim for an extension of the original term of his patent. It is not, therefore, too much

to expect that he should be prepared, when the necessity arises, to give the clearest evidence of everything which has been paid and received on account of the patent" ⁽¹⁾. And the same doctrine is laid down by Lord Cairns in *Saxby's Patent* ⁽²⁾, which insists upon the necessity of the patentee giving their Lordships accounts which, as he expresses it, should be so clear as not to admit of controversy.

Now their Lordships feel some anxiety whether or not they would be justified in passing these accounts, that is to say, in so far approving of them as to base an extension of the patent upon them, and have with some reluctance come to the conclusion that these accounts are not satisfactory, and that they could not adopt them as satisfactory without in some degree, at all events, relaxing the rule which has been laid down many times by their predecessors.

[Their Lordships then discussed the accounts which had been made up, after the destruction of a number of his books by rats, &c., by the petitioner, with the result that they were declared "to rest upon no valid foundation." The judgment then proceeded:]

Under these circumstances their Lordships, though they are not prepared to say that the plaintiff may not have been insufficiently remunerated, cannot enter into a speculation as to what his absolute remuneration was. It may have been a good deal more than here appears. It is perhaps difficult to suppose it *can have been less, but whether it was or was not sufficient appears to them not to be the question, but whether he has complied with the condition of supplying them with a satisfactory account. Under these circumstances their Lordships have come to the conclusion that the account is not satisfactory. It is not founded only upon the omission (which they regard as a serious one) to give them information upon the foreign patents, but also upon the ground that the accounts not being satisfactory they feel that it would not be consistent with their duty to advise Her Majesty to extend this patent.

Solicitors for petitioner: *Wynne & Son.*

Solicitors for opponents: *Field, Roscoe & Co.*

Solicitor for the Crown: *The Treasury Solicitor.*

⁽¹⁾ 1 Moore's P. C. (N.S.), 61.

⁽²⁾ Law Rep., 3 P. C., 292.

[6 Appeal Cases, 181.]

J.C.*, Jan. 28; Feb. 1, 22, 1881.

[PRIVY COUNCIL.]

*EDWARD JAMES DANIELL, *Defendant*; and JAMES [181]
SINCLAIR, *Plaintiff*.

ON APPEAL FROM THE COURT OF APPEAL AT NEW ZEALAND.

Mortgagor and Mortgagee—Settled Account re-opened, Compound Interest charged by Mistake—Mutual Mistake of Law.

In the absence of special agreement simple interest only can be charged in a mortgage account.

Where such mortgage account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding the mortgage deed to require the same:

Held, that such settled account might be re-opened.

Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law; yet in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn.

APPEAL from an order of the Court of Appeal of New Zealand (Feb. 4, 1880,) affirming a decree (Oct. 1, 1879,) of the Supreme Court.

This latter decree, so far as it was originally appealed against, decreed that simple interest only since the 4th of January, 1869, should be allowed upon £2,472 4s. 6d., the balance admitted as the principal sum due by the respondent to the appellant on that date, on the footing of a mortgage dated the 11th of May, 1865, and that in taking an account as thereby directed, the account hereinafter mentioned as signed by the respondent on the 11th of May, 1872, should not be considered as a stated and settled account between the parties ascertaining and fixing the amount due on that date.

The circumstances out of which the suit arose and the findings *of the jury thereon are set out in the judgment of their Lordships. [182]

The judgment of the Court of Appeal was to the effect that compound interest could not be charged, there being no agreement to that effect between the parties either express or implied. Upon the latter point it proceeded:

“But, assuming that an agreement may be implied between mortgagor and mortgagee, pure and simple, to pay

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

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Daniell v. Sinclair.

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compound interest founded upon the acts, mode of dealing, or acquiescence of the parties, the question remains whether such an agreement ought to be implied in the present case.

"This question may be dealt with in either of two modes, viz., either by looking at the facts admitted by the pleadings and the findings of the jury only, which we take to be the mode more in accordance with the rules of the Supreme Court of New Zealand, or by looking not only at these but also at the evidence laid before the jury, as perhaps a court of equity in England would do. We shall adopt both modes.

"Taking the first mode, we find that the respondent, upon the 4th of January, 1869 (the mortgage being dated the 11th of May, 1865, payable on the 11th of May, 1867), admitted by deed his indebtedness to be £2,547 12s. 2d., a portion of which amount was composed of compound interest, of which the respondent was at the time aware. This, on the principle of *Blackburn v. Warwick* (1), concludes him up to that date, and it is on that basis that the direction appealed against proceeds.

"But that does not imply any agreement to pay similar compound interest in future. *Fergusson v. Fyffe* (2) and *Blackburn v. Warwick* (1) establish this. Then we find that the accounts between the respondent and the appellant have always been kept with half-yearly rests, and that the interest due at such half-yearly rests has been added to the principal and interest charged thereon accordingly. Now the interest on the mortgage was payable not half-yearly but quarterly, and it is difficult to understand why these rests should have been made half-yearly, except upon the presumption which we shall hereafter refer to, and assuming [183] ing *that by the finding that the accounts were so "kept" is meant that they were so prepared by appellant, rendered to respondent, and not objected to by him, this cannot constitute an agreement by acquiescence, otherwise *Tompson v. Leith* (3) was wrongly decided. There, there were not only accounts rendered, but formal notice given that interest on interest would be charged, which was never objected to. In *Clancarty v. Latouche* (4) the acquiescence in accounts rendered, which was held to imply an agreement, was an acquiescence in a common mercantile custom of bankers on a banker's account.

"Then we find that the respondent, on the supposition that the mortgage authorized the defendant to charge com-

(1) 2 Y. & C. (Exch.), 99.

(2) 4 Jur. (N.S.), 1091.

(3) 8 Cl. & F., 121.

(4) 1 Ball & B., 420.

pound interest, consented to the accounts being so kept, and ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts.

"Now, even admitting the supposition of the respondent referred to, it seems to us that the ratifying and confirming in writing (not by deed) of accounts rendered, and an admission of indebtedness to the amount shown, is not conclusive, though it may be presumptive evidence of the accuracy of such accounts.

"Errors, whether in calculation or in mode of charging, might, nevertheless, be urged in defence to an action on the account stated, although they might not form a ground for recovering an amount erroneously paid: *Rose v. Savory* ('); *Thomas v. Hawkes* ('); *Wilson v. Wilson* ('). But when taken in conjunction with the finding of the jury as to the respondent's state of mind when making the admission of indebtedness, we do not think much weight ought to be attached to such admissions, and certainly they cannot be accepted as implying an agreement to pay compound interest in face of the deed of mortgage.

"These, according to this mode of dealing with the question, are the only facts in support of an implied agreement to pay compound interest; whilst, on the other hand, it appears from the declaration that both parties are merchants, and therefore *accustomed to keep accounts of their [184 ordinary mercantile transactions in the form in which these mortgage interest accounts have been kept. Indeed, the balance of their mercantile account, £15 7s. 8d., seems to have been mixed up with the interest account, and on that sum compound interest has been allowed by consent, although otherwise the court could not on the principle of *Fergusson v. Fyffe* (') and other cases, have allowed it.

"Taking now the other mode of considering this question, by looking, in addition, at the evidence submitted to the jury, it appears to us that the evidence scarcely bears out the finding of the jury. The evidence shows an acquiescence in, rather than a consent to, the mode in which the accounts were kept, and the hesitating and bald certificates to the two accounts rendered do not to our minds amount to a ratification and confirmation of accounts, nor an admission of indebtedness sufficient to stop the respondent from setting up his legal and equitable rights under the mortgage deed.

"In either view it seems to us that *Tompson v. Leith* (')

(') 2 Scott, 199.

(') 8 M. & W., 140.

(') 14 C. B., 616.

(') 8 Cl. & F., 121.

(') 4 Jur. (N.S.), 1091.

was a much stronger case than the present one for allowing compound interest. There deliberate notice was from time to time given of the intention to charge compound interest, and that notice in writing, if not formally consented to, was in writing acquiesced in. Here the two parties treat their mortgage rights and liberties as if they were upon ordinary mercantile accounts, apparently ignorant or oblivious of the difference between the two sets of positions.

"*Crosskill v. Bower* (*) also seems to us a strong authority for the respondent, the portion of the judgment therein so strongly relied on in argument by Mr. Bell applying clearly to the mercantile account, not to the mortgage debt. Whilst the case of *Mosse v. Salt* (*), relied on in the judgment of the court below, seems to us to be in point, and well applied."

Mr. Benjamin, Q.C., and Mr. Everitt, for the appellant, contended that compound interest had been charged in the [185] account *with the consent of the respondent. The appellant had on the faith of his settling accounts from time to time on that footing, continued to give credit to him, and, therefore, there was consideration. It was unnecessary that such consent should be evidenced by deed. The settled account was evidence sufficient. There was no *prima facie* case made out for relieving the respondent from the consequences thereof. Here there was express agreement with some consideration, and notwithstanding mistakes of law, i.e., as to the construction of a deed and the legal rights of the parties thereunder, the agreement was valid and binding. Reference was made to *Mosse v. Salt* (*); *Clancarty v. Latouche* (*); *Crosskill v. Bower* (*); *Blackburn v. Warwick* (*); *Chambers v. Goldwin* (*); *Tompson v. Leith* (*); *Stewart v. Stewart* (*); *Kitchin v. Hawkins* (*); *Rogers v. Ingham* (*); *Alliance Bank v. Broom* (*). To get leave to surcharge and falsify you must, according to equity rules and procedure, allege and prove errors of account in fact, and that has not been done here: *Parkinson v. Hanbury* (*); *Drew v. Power* (*); *Gething v. Keighley* (*); *Fergusson v. Fyffe* (*). [SIR BARNES PEACOCK referred to *Skyring v. Greenwood* (*).] See also notes to Smith's

(*) 32 Beav., 86.

(*) 32 Beav., 269.

(*) 32 Beav., 269; 32 L. J. (Ch.),

756.

(*) 1 Ball & B., 420.

(*) 32 Beav., 86.

(*) 2 Y. & C. (Exch.), 99.

(*) 9 Ves., 271.

(*) 4 Jur. (N.S.), 1091.

(*) 6 Cl. & F., 911.

(*) Law Rep., 2 C. P., 22.

(*) 3 Ch. D., 351; 18 Eng. R., 552.

(*) 2 Dr. & S., 289.

(*) Law Rep., 2 H. L., 1.

(*) 1 Sch. & Lef. (Irish), 182.

(*) 3 Ch. D., 547; 26 Eng. R., 327.

(*) 8 Cl. & F., 121.

(*) 4 B. & C., 281.

Leading Cases, vol. ii, [7th ed.], pp. 420, 421; Seton on Decrees, vol. ii, part 4, pp. 794, 796 [4th ed.]

Mr. *Rigby*, and Mr. *Chalmers* (the Solicitor-General, *Sir F. Herschell*, Q.C., with them), for the respondent, contended that compound interest was not recoverable. The Court of Appeal was right in holding that there was an acquiescence in rather than a consent to the mode in which the accounts were kept. The settled accounts, although *prima facie* evidence of indebtedness, could not estop the respondent from setting up his rights *under the [186 mortgage deed. Moreover, a mortgagee relying on a settled account must plead it, see *Roberts v. Kuffin* (*), a case recognized as authority by Maddocks, and all successive editors of *Daniell's Chancery Practice*, and by *Lindley*. In surcharging and falsifying an account errors of law as well as of fact may be corrected. Equity does not distinguish between mistakes of law and mistakes of fact as a ground for relief, except that it will not come into conflict with courts of law; and as the latter have laid it down that money actually paid under a mistake of law cannot be recovered back, that principle is not interfered with. One error is sufficient to open an account—perhaps an error of fact, but, when open, errors of law may be corrected. There is no authority to be cited that an account may be opened for mistake of law, for it has never been questioned. Reference was made to *Rogers v. Ingham* (*); *Re James* (*); *Earl Beauchamp v. Winn* (*); *Rose v. Savory* (*); *Thomas v. Hawkes* (*). The rule relied upon is merely one which is intended to put an end to litigation, and therefore is not applicable till money has been actually paid, mere settlement of account is not enough: *Wilson v. Wilson* (*). It is not pleaded that accounts were signed because forbearance was agreed to be given: *London Chartered Bank of India v. White* (*). Reference was also made to *Kendal v. Wood* (*).

Mr. *Benjamin*, Q.C., replied.

Feb. 22. The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER: This was a suit instituted for the redemption of a mortgage, and an account of the principal and interest due. The defendant contended that com-

(*) 2 Atk., 112.

(*) 3 Ch. D., 351; 18 Eng. R., 552.

(*) Law Rep., 9 Ch., 609; 10 Eng. R., 619.

(*) Law Rep., 6 H. L., 223; 6 Eng. R., 37.

(*) 2 Scott, 199.

(*) 8 M. & W., 140.

(*) 14 C. B., 616.

(*) 4 App. Cas., 413, 424; 33 Eng. R.,

(*) Law Rep., 6 Ex., 243.

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pound interest was due, and whether the interest was to be [187] simple or compound was the only question in *the cause. The court of first instance gave judgment in favor of the plaintiff, with the exception of a small sum of compound interest, which the plaintiff by the deeds of further security to be afterwards referred to had converted into principal. This judgment was affirmed by the Court of Appeal. From the latter judgment the present appeal is preferred.

The plaintiff is a merchant in New Zealand, the defendant a merchant in London. The declaration sets out a mortgage bearing date the 11th of May, 1865, for the purpose of securing payment of £2,000, advanced by the defendant to the plaintiff for two years, and of all such further and other sums, if any, as may at any time hereafter be due and owing by the mortgagor to the mortgagee on the balance of any account current hereinafter existing between the said parties hereto, or in respect to any future advances to be made between the said parties in any account whatsoever; then follows a covenant to pay interest at the rate of 10 per cent. on the balance of account current after demand in writing, and to pay the principal sum on the 11th of May, 1867, and interest thereon at 10 per cent. in quarterly payments.

The declaration further sets out two conveyances, dated the 4th of January, 1869, to one Stuart, for the purpose, in the first place, of securing a debt to Stuart; and, secondly, of further securing the debt to the defendant, which the plaintiff acknowledged then to amount to £2,487 12s. 2d. (which addition of £487 12s. 2d. to the principal was composed partly of compound interest), with a power of sale to Stuart, for, in the first place, paying himself, and then making payments to the defendant. The declaration alleges sales by Stuart and the defendant, and some payments by Stuart to the defendant, and prays for an account of the principal and interest due on the mortgage, and a reconveyance.

The material pleas by the defendant are, 1, that the moneys advanced by him were advanced on a mercantile account current; 2, that it was agreed between plaintiff and defendant, both at the time of and immediately after the execution of the deed set out in the first paragraph of the plaintiff's declaration, that in taking and keeping the account current [188] between the plaintiff and *defendant half-yearly rests should be taken, and that the interest due on the half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly; and the

accounts have always been so kept with the consent of the plaintiff, who has from time to time ratified accounts so kept, and admitted his indebtedness to the defendant of the whole amount shown in such accounts, where interest has been computed upon half-yearly rests.

The defendant submitted to the taking of the accounts as prayed.

The plaintiff, in reply, denied the agreement.

The following are the material issues in the case, and the findings upon them by the jury :

Was the amount of the plaintiff's indebtedness to the defendant on the 4th of January, 1869, the sum of £2,487 12s. 2d. ?—Yes.

If so, was the said sum of £2,487 12s. 2d. composed of the principal sum of £2,000 mentioned in the said deed of mortgage, and £487 12s. 2d. interest due in respect of the said principal sum ?—Yes, except £15 7s. 8d., deficiency in proceeds of wool consigned by plaintiff to defendant.

Was the said principal sum of £2,000 advanced by the defendant to the plaintiff on a mercantile amount current ?—By direction, No.

Was any portion of the said sum of £2,487 12s. 2d. advanced by the defendant to the plaintiff upon a mercantile account current, and, if so, how much ?—Yes, the said sum of £15 7s. 8d., and no more.

Was it agreed by and between the plaintiff and defendant, after the execution of the deed set out in the first paragraph of the declaration, that in taking and keeping the accounts between the plaintiff and the defendant half-yearly rests should be taken, and that the interest due at such half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly ?—No, unless such agreement ought in law to be implied from the plaintiff's accounts being so kept. But we find that he so consented on the supposition that a deed in the terms of *the mortgage of the 11th of May, 1865, authorized [189 the defendant to charge compound interest.

Have the accounts always been so kept ?—Yes.

Has the plaintiff consented to the accounts being so kept, and has he ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts ?—Yes.

No attempt was made at the trial to prove an actual agreement, either written or oral, to change the interest, as stipulated in the mortgage deed, from simple to compound, and it seems clear that no such agreement was ever made. But it

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appeared that the plaintiff, under the belief that he was bound to pay compound interest on the mortgage, assented to accounts made out on the footing of half-yearly rests, and that, in particular, on an account being sent to him stating a balance of £3,464 16s. 2d. as due on the 11th of May, 1872, part of which consisted of compound interest charged on the footing of half-yearly rests, he signed it as correct, and that in 1876 he sent to the defendant what he termed a sketch account, in which compound interest with yearly rests was calculated.

A judge sitting in banco adopted the finding of the jury, that no actual agreement to pay compound interest had been come to; he further came to the conclusion that both parties wrongly understood the mortgage deed as requiring the payment of compound interest, and that no agreement to pay it could be implied from the transactions between the parties, such interest having been charged by the defendant and paid by the plaintiff under a common misapprehension of their rights. He therefore gave effect to the rule of law, which was undisputed, that without such an agreement simple interest only can be charged on a mortgage account. He treated, however, the deeds which stated that £2,487 12s. 2d. was due by the defendant on the 4th of January, 1869, as binding on him, and directed the master to commence the account from that day, treating the whole of that sum as principal.

The judgment of the Court in Banco was confirmed by the Court of Appeal.

It appears that the defendant insisted, independently of [190] the *main question, that a direction should be given that the account prior to the 11th of May, 1872, should not be re-opened, contending that, even upon the assumption of there having been no agreement to vary the rate of interest under the mortgage, the account up to that time was settled, and could not be disputed. The judge sitting in banco declined to give such a direction, observing, "In my opinion, this is nothing more than a particular instance of that general acquiescence on the part of the plaintiff in the defendant's mode of stating the account between them with which I have already dealt; and, for the reasons already given, and on the authority already cited, his approval of the account on this occasion does not conclude him."

The same view is taken by the Court of Appeal.

On the appeal before this board, this last is the only point now relied on, it not being contended that the settlement of

account, if it were such, would not prove a contract to pay compound interest for the future.

Undoubtedly there are cases in the courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off: *Skyring v. Greenwood* (*). But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In *Earl Beauchamp v. Winn* (*), Lord Chelmsford observes, "With regard to the objection, that the mistake (if any) was one of law, and that the rule '*ignorantia juris neminem excusat*,' applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well known rule of law; and there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake."

*In *Cooper v. Phibbs* (*), Lord Westbury says: [191 "Private right of ownership is a matter of fact; it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake."

In *McCarthy v. Decaix* (*), where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes, "What he has done was in ignorance of law, possibly of fact; but, in a case of this kind, this would be one and the same thing."

In *Livesey v. Livesey* (*), an executrix who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments.

Undoubtedly the signature by the plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been

(*) 4 B. & C., 281.

(*) Law Rep., 2 H. L., 170.

(*) Law Rep., 6 H. L., 234; 6 Eng. R., 37.

(*) 3 Russ. & My., 614.

(*) 3 Russ., 287.

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come to, and it was for the purpose of proving the agreement which the defendant had pleaded that the account was relied upon. Their Lordships accept the finding of the jury that no such agreement was in fact made; indeed there would seem to have been no consideration for it, because, although the defendant did not exercise his power of sale as soon as he might, there is no evidence that he ever bound himself or promised to show any forbearance or indulgence to the plaintiff. Their Lordships further agree with the courts below, that both parties may be taken to have misunderstood the effect of the mortgage deed. This being so, there was no intention to make a change in the rate of interest—no such question was discussed or considered. The accounts were drawn up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are therefore of opinion that the signature of a particular account occurring in a series of 192] accounts *all alike drawn up in error, does not prevent it being re-opened upon the accounts under the mortgage being taken.

They will, therefore, humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal dismissed with costs.

Solicitors for appellant: *Clarke, Rawlins & Clarke.*

Solicitors for respondent: *Hare & Fell.*

[6 Appeal Cases, 193.]

H.L. (E.), Jan. 14, 17, 18; March 7, 1881.

[HOUSE OF LORDS.]

193] *MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT, *Appellants*; and FREDERICK HILL and Others, Executors, &c., WILLIAM LUND and ALFRED FRIPP, *Respondents*.

Metropolitan Poor Act—Hospitals—Nuisance.

The Metropolitan Poor Act, 1867 (30 Vict. c. 6), authorizes the formation of districts and district asylums for the care and cure of sick and infirm poor, creates corporations for that purpose, gives authority to the Poor Law Board (now the Local Government Board) to issue directions to these corporations, enables them to purchase lands and erect buildings for the purposes of the act, and makes the rates of parishes and unions liable for the outlay thus incurred. But it does not, by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighborhood of the place where the land is purchased, or the buildings erected, it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact:

Held, that the District Board could not set up the statute, nor the orders of the Poor Law Board under it, as an answer to an action, or to prevent an injunction issuing to restrain the board from continuing the nuisance.

Per LORD BLACKBURN: On those whose seek to establish that the Legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication.

Per LORD WATSON: Where the terms of a statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights.

THE appellants were persons who had been incorporated by the Metropolitan Poor Act, 1867 (30 Vict. c. 6), for the purpose of providing hospitals for the reception of the sick poor of the metropolis. Sir Rowland Hill (whose executors were the first of the respondents), Mr. Lund, and Mr. Fripp, resided at Hampstead and had property there, and the action, the subject of the present appeal, was brought by them against the appellants, alleging that *the appel- [194 lants had erected a certain hospital near their properties, for the reception of persons suffering from small-pox and other infectious and contagious disorders, which was a nuisance, and had carried on the said hospital so as to be a nuisance. The appellants traversed these allegations.

The cause came on for trial before Mr. Baron Pollock and a special jury on the 18th of November, 1878. The learned judge left certain questions to the jury which, their answers, were in the following form: "(1.) Was the hospital a nuisance occasioning damage to the plaintiffs, or either and which of them, *per se*; or (2.) was it a nuisance to them by reason of the patients coming to or going from the hospital? —Ans. to the two questions. The hospital was a nuisance occasioning damage to the plaintiffs, and each of them, *per se*, and also by reason of the patients coming to or going from the hospital. (3.) Assuming that the defendants were, by law, entitled to erect and carry on an hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?—Ans. No. (4.) Assuming them by law entitled to erect and carry on this hospital, did they do so with all proper and reasonable care and skill with reference to the plaintiffs' rights?—Ans. No. (5.) Did the defendants use proper care and skill with reference to the ambulances?—Ans. The ambulances ought to have been disinfected before leaving the hospital." As to everything done in the hospital itself the jurors gave great praise to everybody concerned. The verdict was on these answers ordered to be entered for the plaintiffs, and on farther consideration judgment was entered for them, and the learned judge granted an injunction to restrain the defendants from con-

tinuing to use the hospital as before, but the issue of the injunction was suspended with liberty to either party to apply, and execution was stayed⁽¹⁾. A rule to reverse the judgment or to have a new trial was obtained, and an order was made by the Queen's Bench Division dissolving the injunction and granting a new trial, with a direction that the costs of the first suit should abide the result of the new trial. The plaintiffs appealed against that order as to the granting a new trial, and the defendants appealed against it as to the [195] payment of costs, and on the 18th of *December, 1879, the Court of Appeal made an order varying it by dismissing the plaintiffs' appeal if, within a specified time, the defendants paid the costs of the first trial (with an exception of certain specified costs), and if that was not done, the plaintiffs' appeal was to be allowed. This order of the Court of Appeal as to granting a new trial was brought up to this House and received the designation of Appeal No. 1. In the first instance it was argued on the question of competency, it being alleged by the plaintiffs to be in substance a mere appeal on costs. The House, however, decided that it was not so to be considered⁽²⁾, but, before hearing the appeal on the facts, suggested that it would be advisable to hear the appeal on the question of the right of the appellants, in point of law, to maintain the hospital in its existing state; and this was called Appeal No. 2.

Sir J. Holker, Q.C., and *Mr. Willis*, Q.C. (*Mr. C. H. Anderson*, and *Mr. Proudfoot* were with them), for the appellants: What had been done here was done under statutory authority, and therefore was not the subject of an action at the suit of individuals who alleged that they were injured by it. The injury was, matter of fact, denied, and would be argued on the appeal against the order granting a new trial, but in the present appeal the question raised was whether the appellants were not, in law, completely protected from liability. They were constituted a public body by virtue of a statute—they had duties specially assigned to them—those duties were of a public nature—the appellants were required to perform them, being thereto commanded by the Local Government Board. They had obeyed the orders of that board, and as everything that had been done had been so done under statutory authority, any private individuals who thereby suffered inconvenience must bear it, for such was the intention of the Legislature, which, in passing the statutes relating to this matter, must be assumed to have contemplated the possibility of the private inconven-

(1) 4 Q. B. D., 433; 29 Eng. R., 1.

(2) 5 App. Cas., 582.

ience, and to have determined that that inconvenience must be submitted to, in consideration of the great public benefit that was to result from it. The case of *Rex v. Pease* (*) laid down that doctrine, which had received *its complete and authoritative confirmation in *The Hammersmith Railway Company v. Brand* (*). The principle, therefore, was clear, and the words of the sections of the statute justified its application in the present case. The 5th section of the 30 Vict. c. 6, declared that "Asylums may be provided under this act for the reception and relief of the sick, insane, or infirm or other class or classes of the poor chargeable in unions or parishes." The Poor Law Board was authorized (s. 6) for the purposes of the act to combine into districts, parishes or unions, and sect. 7 directed in clear and positive terms that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." The 15th section gave the Poor Law Board powers from time to time to direct the managers of the asylums "to purchase or hire, or to build and fit up a building or buildings for the asylum, of such nature and size, and according to such plan as the Poor Law Board should think fit, and the managers shall carry such direction into execution." These last words cast an imperative duty on the managers, and rendered what they had done the execution of a clear statutory provision to which they were bound to pay obedience. Other sections gave the managers power to borrow money, on the security of the rates, for the purposes of the act, and sect. 69, sub-sect. 2, declared that expenses incurred for "the maintenance of patients in any asylum specially provided under this act for patients suffering from fever or small-pox" shall be repaid out of the common poor fund. Every detail in the act showed that the Legislature had contemplated the carrying into execution a public work for the health and safety of the public. That being so, it was impossible to apply to the case the considerations of possible private inconvenience that might occur in the execution of the great public work. The managers, in fact, were the mere executants of the orders of the Poor Law Board, the 28th section declaring that they shall be subject to the orders of the Poor Law Board "as guardians are under the Poor Law Acts." Everything in the act showed that the purpose in view was deemed a public purpose—the powers conferred were large, because they were powers for the execution of a public purpose, and the authority of the Poor Law Board was paramount throughout the act. [197

(*) 4 B. & Ad., 30.

(*) Law Rep., 4 H. L., 171.

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Such cases therefore as *Rex v. Vantandillo* ⁽¹⁾, and *Rex v. Burnett* ⁽²⁾, where the things done were unlawfully done, either had no application here or actually showed that what was here done, being lawfully done, could not be made the subject of complaint.

Mere private inconvenience is not to be made the subject of an action where the act from which it arises has been authorized by act of Parliament, and the powers given by the act have not been exceeded. *The British Cast Plate Manufacturers v. Meredith* ⁽³⁾. *The Caledonian Railway Company v. Ogilvy* ⁽⁴⁾; *Vaughan v. Taff Vale Railway Company* ⁽⁵⁾; *The Attorney-General v. The Bradford Canal Company* ⁽⁶⁾; *The Attorney-General v. The Colney Hatch Asylum* ⁽⁷⁾; *Geddis v. The Bann Reservoir Company* ⁽⁸⁾; *Attorney-General v. Leeds* ⁽⁹⁾ were also cited. The cases which turned on the negligent performance of the duties and labors intrusted by Parliament to certain specified persons, such as *Whitehouse v. Fellowes* ⁽¹⁰⁾, had no application to this case, for here negligence was expressly denied, and the management of the hospital itself had received the warm commendation of the jury.

This injunction ought not to have been granted; the fears of mankind are not alone sufficient to warrant an injunction, especially in a case like this, where a great public benefit was intended to be, and would be, the consequence of the work done: *Anonymous* ⁽¹¹⁾; *Baines v. Baker* ⁽¹²⁾. *Hawley v. Steele* ⁽¹³⁾ is a clear authority that where a work of a public nature like this is authorized to be done, a private individual who suffers an inconvenience from it cannot sustain an application for an injunction.

The Solicitor-General (Sir Farrer Herschell), and Mr. Bompas, Q.C. (Mr. Finlay was with them), for the respondents: The principle laid down in *The Hammersmith Rail-198] way Company v. Brand* ⁽¹⁴⁾ is not questioned. What the Legislature has ordered to be done, if done as the Legislature has ordered it, cannot be made the subject of an action on account of inconvenience suffered by a private individual. But it must be clear that the Legislature has given the order, and that the order so given has been thor-

⁽¹⁾ 4 Mau. & S., 78.

⁽²⁾ 4 Mau. & S., 272.

⁽³⁾ 4 T. R., 794.

⁽⁴⁾ 2 Macq. Sc. Ap., 229.

⁽⁵⁾ 5 H. & N., 679.

⁽⁶⁾ Law Rep., 2 Eq., 71.

⁽⁷⁾ Law Rep., 4 Ch. Ap., 146.

⁽⁸⁾ 3 App. Cas., 430; 24 Eng. R., 320.

⁽⁹⁾ Law Rep., 5 Ch. Ap., 583.

⁽¹⁰⁾ 10 C. B. (N.S.), 765; 30 L.J. (C.P.), 305.

⁽¹¹⁾ 8 Atk., 750.

⁽¹²⁾ Amb., 158.

⁽¹³⁾ 6 Ch. D., 521; 23 Eng. R., 120.

⁽¹⁴⁾ Law Rep., 4 H. L., 171.

oughly pursued. The contention here is, that no such order has been given by the statute, but that the Metropolitan Poor Act has merely declared what was desirable to be done, and has authorized the persons who might be intrusted to do the work, to come on the poor rates of parishes and unions to reimburse the expenses they had incurred. There is nothing whatever in the Metropolitan Poor Act of 1867, to compel the appellants to erect the small-pox hospital, to erect it in this particular place, or in this particular manner, and certainly nothing to authorize them to do all this in such a manner as to constitute the work a nuisance to the proprietors of the neighboring lands. The fact that it is a nuisance has been found by the jury—and that finding takes away from the appellants all pretence of protection under the statute, unless they can establish from the very words of the statute that all that they have done is directly ordered by the statute. They cannot do so, and the orders of the Poor Law Board do not assist them. They are told they may do certain things, but there is no authority directing them to do those things if the things themselves constitute a nuisance. There being no compulsory powers given to the managers to do what they have done, they are in the position of ordinary persons who, upon the principle stated by Lord Justice Mellish in *Clowes v. The Staffordshire Potteries Waterworks Company* (*), are entirely responsible for their acts. Powers given in matters of this sort must be strictly followed, and are not to be extended in favor of those on whom they have been conferred. *Harley v. Steele* (†) is not in point against the respondents, and in that case itself the Master of the Rolls, in refusing the injunction, suggested a strong opinion (‡) that the acts of Parliament relating to that matter “looked very much like authority” for doing what was complained of. That is not the case here: *Jones v. The Festiniog Railway Company* (†) is *strongly adverse to the claim of the appellants, for [199 there the company was held liable for damages occasioned by sparks falling from one of its locomotive engines, because it had not express power given it to use locomotives; and in that case negligence in their use was expressly negatived. The statutory authority here is absent, and therefore what has been done is subject to question in an action, and the fact of a nuisance being established, the verdict and judg-

1881 ^(*) Law Rep., 8 Ch. Ap., 125, at pp. 521; 28 Eng. R., 120.
 140; 4 Eng. R., 807. ^(†) 6 Ch. D., at p. 527; 28 Eng. R., 126.

(‡) Law Rep., 3 Q. B., 733.

ment were properly given for the plaintiffs, and justified the court in issuing the injunction.

Mr. *Willis*, in reply.

March 7. THE LORD CHANCELLOR (Lord Selborne): My Lords, it must be assumed for the present purpose, that the small-pox hospital which the appellants have established at Hampstead, is, in its actual position, and independently of the particular way in which it is conducted, necessarily a nuisance to the neighbors; and the injunction, which has been granted by the order appealed against, is against "using the plot of land mentioned in the statement of claim, and buildings thereon, as a hospital for small-pox or any other infectious or contagious disorder, in such manner as to create a nuisance to the plaintiffs, or either of them." The appellants are therefore obliged, in order to succeed in this appeal, to prove that they have statutory authority to create a nuisance for the purpose of, and as incidental to, the maintenance of a small-pox hospital in this place.

The appellants say that such authority has been given to them by the 5th, 7th, and 15th sections of the Metropolitan Poor Act, 1867, and by orders of the Poor Law Board made pursuant thereto. As far as the orders of the Poor Law Board are concerned, they did undoubtedly direct the appellants to purchase the land in question at a specified price, and to build upon it an asylum for the reception of poor persons infected with or suffering from fever or small-pox; and I assume that the building, as erected and fitted up on that land, is in strict accordance with plans which the Poor Law Board has prescribed or approved.

The statute when examined is found to confer, in general terms, powers extending over a rather wide range of subjects. So far as it relates to a hospital or asylum of this particular kind, there is nothing in it mandatory or imperative. Everything which it necessarily requires may be done, though no such hospital should ever, or anywhere, be established. The 5th section says that, "asylums to be supported and managed according to this act, may be provided under this act for reception or relief of the sick, insane, or infirm, or other class or classes of the poor chargeable in unions or parishes in the metropolis." The 6th section authorizes the formation of districts; and the 7th requires that, in each district so formed, "there shall be an asylum or asylums as the Poor Law Board from time to time by order direct;" leaving the class of poor persons, for whom any such asylum may be provided, entirely open. The 15th section enables the Poor Law Board from time to time, by

order, to direct the managers "to purchase or hire, or to build, and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan, and in such manner, as the Poor Law Board think fit;" and the managers are required to carry such directions into execution. Subsequent clauses put the arrangements and conduct of any such asylum under the superintendence of the Poor Law Board. No compulsory power is given to acquire land, or any interest in land, for any asylum purposes. The Lands Clauses Acts are indeed incorporated by sect. 52; but sect. 53 expressly provides, that so much of those acts as relates to the purchase of land, otherwise than by agreement, shall not be put in force except for certain purposes, not including these asylums. It appears incidentally from sect. 69 (which provides for the repayment of certain expenses therein specified out of the common poor fund), that asylums might be "specially provided under this act for patients suffering from fever or small-pox;" but, except in that way, and from the fact that the general category of "sick" necessarily includes patients suffering from any kind of disease, there is no provision in the act as to contagious or infectious disorders. If express words, or necessary implication and intendment, must be shown, in order to authorize the Poor Law Board, or any managers of an asylum, to create a nuisance, in the exercise of the discretionary powers given to them, I can find none in this statute.

*The result is: (1.) That this act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (2.) That as to those things which may or may not be done under it, there is no evidence on the face of the act that the Legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances, without creating a nuisance; and (3.) That the Legislature has manifested no intention that any of these optional powers, as to asylums, should be exercised at the expense of, or so as to interfere with, any man's private rights. The only sense in which the Legislature can be properly said to have authorized these things to be done is, that it has enabled the Poor Law Board to order, and the managers to do them, if, and when, and where, they can obtain by free bargain and contract the means of doing so.

If the Legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of

establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex v. Pease* ⁽¹⁾ and *The Hammersmith Railway Company v. Brand* ⁽²⁾. No person outside the statutory line of compensation, even if the use of the asylum in the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the footing that what the statute authorized was a legal nuisance to himself, or, in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground, or have interfered with any, the most insignificant, easement against the will of the plaintiffs, or of any other person to whom such land or easement might belong. No line 202] is here drawn by the Legislature between *interests which are, and interests which are not, proper subjects for compensation. Under these circumstances, I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent.

I therefore move your Lordships to affirm the judgment of the court below, and dismiss this appeal.

LORD BLACKBURN: My Lords, in this case the respondents, who were the plaintiffs below, claimed in their writ damages for a nuisance arising from the use, by the defendants, of their hospital at Hampstead for small-pox and other infectious and contagious diseases, and for causing the assemblage, in the neighborhood of the plaintiffs' property, of large numbers of persons suffering from small-pox or other infectious and contagious diseases, or having been recently in contact with persons so suffering, and from offensive smells and noises arising from the said hospital; and they asked for an injunction to restrain the defendants from using the said hospital as a hospital for patients suffering from small-pox or other infectious and contagious diseases. [His Lordship here stated the proceedings which had taken place, and proceeded thus:] The point on which the defendants principally relied in the Appeal No. 2 was

⁽¹⁾ 4 B. & Ad., 80.

⁽²⁾ Law Rep., 4 H. L., 171.

that, as they contended, the Legislature had, by the Metropolitan Poor Law Act, 1867, authorized the erection and maintenance of asylums for the reception of the sick poor chargeable in the metropolis; and with that object had given power to the Poor Law Board to make the metropolis into a district, and to create a corporation to be called the Managers of the Metropolitan Asylum District, who were bound to obey the directions of the Poor Law Board; that the defendants were duly created by orders of the Poor Law Board; that all they had done in making and maintaining the hospital was *bona fide* done in obedience to the directions of the Poor Law Board, and the Local Government Board, which has since been substituted for the Poor Law Board.

And their contention was that, even if the maintenance of this hospital was a nuisance to the plaintiffs, as owners and occupiers of adjoining property, such that if it had been maintained by *private persons the plaintiffs would [203 have been entitled to relief, the Legislature has thought fit for the public good to deprive them of that relief. This is a question of great public importance. It has been judged better to determine this question first.

In order to raise this question it must be assumed that the maintenance of this hospital on this plot of ground for the reception of so large a body of small-pox patients is necessarily a nuisance to the adjoining occupiers. But this must be without prejudice to the contention of the defendants that the first two findings of the jury were not satisfactory. And it must also be without prejudice to the contention of the plaintiffs, that even if the construction of the act be what the defendants contend and the plaintiffs deny, still that the answers of the jury to the third, fourth, and fifth questions of the judge, if satisfactorily obtained, would entitle the plaintiffs to some relief. I now proceed to the discussion of the question thus raised.

I think that the case of *The Hammersmith Railway v. Brand* (¹), in your Lordships' House, settles, beyond controversy, that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away. It is enough to say that such was the unanimous decision of this House; but the reason briefly given by Lord Cairns (²) seems indisputable. "It is a *reductio ad absurdum*" to suppose it left in the power of the person who had the cause of complaint, to

(¹) Law Rep., 4 H. L., 171.

(²) Law Rep., 4 H. L., at p. 215.

obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events. The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others. What was the intention of the Legislature in any particular act is a question of the construction of the act.

Before considering the terms of the Metropolitan Poor Act, 1867, it may be as well to consider what was the state 204] of the law before *it was passed. The successive Poor Law Acts had given powers for the relief of the poor chargeable, and power to raise money for those purposes; and a series of enactments had given powers to purchase sites for workhouses, and to lodge and maintain the chargeable poor in those workhouses, and to raise money for that purpose. Those who had the management of such workhouses had thus the charge of a number of persons assembled together under circumstances that made it very likely that there should be sickness, and often contagious sickness, among them. I can, however, find no words in any of the acts prior to 1844 alluding to that likelihood. There are a few words in the Poor Law Amendment Act, 1844, in the preamble to sect. 4, that show that the attention of those who framed that act had been called to the likelihood of infectious disorders being communicated to the inmates of a workhouse; but there was no provision before the passing of the Metropolitan Poor Act, 1867, casting on the managers of a workhouse any special duties as to the management of the sick poor, nor any power to raise funds for any expenditure incurred for such an object, farther than it was involved in the maintenance of the persons chargeable. It seems that the Legislature left the managers of a workhouse subject to the duties which the common law cast upon those having the charge of others, and did not see any necessity for providing them with extraordinary powers, or with the means of raising funds for extraordinary expenses. Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not) are, at common law, under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person. And the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious,

there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shown that there was a sufficient cause to excuse what is *prima facie* wrong: *Rex v. Burnett* (').

*To take an extreme case, if a house in which a [205 person ill of an infectious disorder lay bedridden, took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd at the risk, or even the certainty, of infecting some of them, no one could suppose that those who carried out the sick person could be punishable; and probably a much less degree of necessity might form an excuse; but still some excuse is required. It is not necessary here to determine what constitutes a sufficient excuse.

Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates, which is very commonly the case with the poor, and consequently those other inmates and the neighbors are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also, though I am not aware of any authority on the subject, that the neighbors could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town, that contagious sickness may befall their neighbors. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them, and if it cannot be done on the spot, and they can, either by their own means, or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use these means. I do not mean to express any opinion as to whether, at common law, they would or would not be responsible for not doing so; but there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbors would be exposed to contagion, though it may be that those neighbors would be fewer in number than the neighbors of the spot where the infection broke out; nor for saying that if that was done,

(') 4 Mau. & S., 272.

and the contagion was such as to amount to a real nuisance, those neighbors might not maintain an action, and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I 206] think it an incident to the use of a habitation *in a town that the occupier must bear the necessary risks of the inmates of a neighboring habitation falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbors wilfully, though for very laudable motives, and not maliciously, bringing in contagion where it did not previously exist, if the effect is not merely to alarm him, but to injure him. This, I think, is borne out by the decisions on the subject of inoculation.

Inoculation was, it is well known, introduced into this country in the early part of the eighteenth century. It consisted in artificially communicating the small-pox in such a manner that the patient took it in a very mild form; but was as much a source of infection to others as if the disease had been taken in the natural manner. The introduction of the practice was vehemently opposed. In 1752 a case came before Lord Hardwicke, which is reported in two reports: *Baines v. Baker* (*). I collect from the two reports that it was proposed by private persons to erect a building in Cold-bath Fields to be used as a hospital for the reception of persons ill of the small-pox, and also for the reception of persons who were there to be inoculated. The plaintiff was, it appears, owner of building land in the neighborhood, and gave evidence (of something which seems very probable) that the fears of infection from the proposed hospital greatly deteriorated the letting value of his property. Lord Hardwicke refused to grant an injunction, saying, what is undoubtedly law, that loss arising from the fears of mankind, though in themselves reasonable, would not create a nuisance at law, and that, before he could grant an injunction, he must be satisfied that what was proposed to be done would be a legal nuisance affecting the plaintiff's private rights. He is reported in Ambler to have said that he thought "such a charity was like to prove of great advantage to mankind; such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far." This I think very true, and it is to be borne in mind when construing the act now in question. Lord Hardwicke seems to have decided that the plaintiff made out no case of a nuisance to his private rights; and that, even if the maintenance

(*) 1 Amb., 158; S.C., *Anon.*, 3 Atk., 750.

*of a place for the artificial propagation of small-pox was indictable, which seems not to have been Lord Hardwicke's opinion, that was a public and not a private nuisance. [207

In *Rex v. Sutton* (*), in 1767, it was held that an indictment for maintaining a house for inoculating for the small-pox was not so plainly bad as to be quashed on motion. This is all that appears from the report, but from what Lord Ellenborough says in *Rex v. Vantandillo* (*) it would appear that there had been much more discussion at the time.

In *Rex v. Burnett* (*), in 1815, it was decided that, though inoculation for the small-pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I also think that, by necessary inference, it follows that to gather together in one spot patients suffering from infectious disease is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease; and, as it seems to me, so as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it.

If this be a correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, sick of infectious disorders, it could not be done by any parochial authorities unless the authority of Parliament was obtained for raising funds for the purpose, and authorizing a public body to obtain a site for the asylum. And the Metropolitan Poor Act, 1867, certainly created such a body and gave it powers to raise money, and without farther powers this body could erect an asylum, provided it was done in such a manner as neither to endanger the public health, nor to form a nuisance to private property. It is, for the reason given by Lord Hardwicke, necessary that the site of such an asylum should be not far from the places where the patients fall sick, and consequently, in the case of the metropolis, in an inhabited district.

I wish to express myself without prejudice to what I suppose will be one of the points to be decided in the Appeal No. 1. If it be the fact that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable *distance, it may be that such a [208 site cannot be obtained at all in the neighborhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If that is the case it might be for the

(*) 4 Burr., 2116.

(*) 4 Mau. & S., 76.

(*) 4 M. & S., 272.

consideration of the Legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well-regulated hospital erected in another place, to such an extent that it was for the public benefit that this latter risk should be run, and whether the rights of owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation.

In the Metropolitan Poor Act, 1867, there are provisions, ss. 15, 16, 17, 18, 21, 28, putting everything under the control of the Poor Law Board, and thus affording a considerable, and probably a sufficient, security that any asylum made under that act should be a well-regulated asylum, and should not be made in any place unless the Poor Law Board thought it a fit place. But the question, as I think, is whether there is an intention shown on the part of the Legislature to authorize the erection of an asylum where it is a nuisance to owners of the adjoining property if the Poor Law Board thought it a fit place, either mistakenly thinking the asylum would be no nuisance there, or, perhaps rightly, thinking that there was no other place in which it could be erected without being a greater nuisance than if erected there.

It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears. There are no express words in this act, and I think the weight of argument is rather against than in favor of such an implication. There is no power given to take land for a site otherwise than by agreement. For, though the Lands Clauses Acts are incorporated by sect. 52, yet by sect. 53 so much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purpose of enlarging an existing workhouse.

The asylum under this act must therefore be either made by (under sect. 18) converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement. In *Clowes v. Staffordshire Potteries Waterworks & Company* (¹), Lord Justice Mellish says (²): "If no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of

(¹) Law Rep., 8 Ch. Ap., 125; 4 Eng. Rep., 807.

(²) Law Rep., 8 Ch., at p. 139; 4 Eng. R., 818.

other persons, who have rights in the nature of easements over the lands so purchased."

He was discussing the question whether the party grieved retained his right to an injunction, or was compelled to seek for compensation. In the Metropolitan Poor Act, 1867, there is no compensation given, and the question is whether the purchase, by agreement, of the site for the asylum, gave the defendants power without compensation to do, what would have been a wrong to the plaintiffs if done by the former owners, which thus gives additional force to the argument of Lord Justice Mellish when applied to the construction of this act.

It is true that in sect. 7 it is said that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time directs." But the construction of that is, I think, only that the managers shall make such asylums in obedience to the order of the Poor Law Board, if they can do so by exercise of the powers given them, and not to say that they must make them at all events, so as to give them additional powers to make the asylums by taking lands, or injuriously affecting lands otherwise than by agreement. I am sensible of the great difficulty that there may be in finding sites for asylums under this act, or hospitals under the Public Health Act, 1875, s. 131, unless farther powers be given, but that must be for the consideration of the Legislature.

I do not understand that any other point is raised on the Appeal No. 2, and if your Lordships take this view of the construction of the Metropolitan Poor Act, 1867, I think it will follow that the Appeal No. 2 should be dismissed with costs.

LORD WATSON: My Lords, the only question to be determined in this appeal is, whether, on the assumption that the first and second findings of the jury are well founded, the respondents are entitled to have an *injunction [210] restraining the appellants from using a building erected by them at Hamstead as an hospital for the reception and treatment of persons suffering from small-pox or other infectious disease, to the nuisance of the appellants, and also to recover damages from the appellants in respect of the injury which they have thereby sustained.

The first and, according to the view which I take of the case, the more important of these two findings, is to the effect that "the hospital was a nuisance *per se*, occasioning damage to the plaintiffs (respondents) and each of them." By these words I understand the jury to affirm that the hos-

pital which the appellants have built, upon the site acquired by them with a view to its erection, cannot be used for the reception and treatment of persons suffering from small-pox without creating a substantial nuisance to the respondents, as owners of certain neighboring properties. I think it may be matter of reasonable inference from the terms of the finding, that nuisance would necessarily be occasioned to the respondents by the use of any hospital for the special accommodation of small-pox patients, on the same site, and similar in size and character to that which the appellants have built. But I do not understand the jury thereby to affirm the impossibility of erecting and using an hospital for the treatment of small-pox on a lesser scale, and according to a different plan, upon the site in question, or the impossibility of procuring elsewhere, a suitable site upon which an hospital, of the same plan and dimensions with that complained of, might be erected and so used without creating a nuisance in either case.

The second finding of the jury affirms that nuisance "was occasioned to the respondent by reason of the patients going to or coming from the hospital." The precise meaning the jury intended to convey by that finding may be doubtful. It may signify that, in the opinion of the jury, the conveyance of small-pox patients to and from the hospital would of itself, and in all circumstances, occasion nuisance, although they might be treated within its walls without creating any nuisance. Or it may simply mean that the provision made by the appellants for the entrance and exit of patients was defective, and that the nuisance thereby occasioned might be obviated by the adoption of a better [211] *arrangement. Owing to the shape in which this appeal comes before the House, I have no means of ascertaining for myself the true import of the finding; and the parties, as I understood, were not at one upon the point. But in the view which I have taken of the legal consequences of the first finding, the second appears to me to be immaterial, whatever its true meaning may be.

I consider myself bound to assume that the verdict of the jury was given according to the facts, and in accordance with the law as correctly stated by the presiding judge. I understood that so much was conceded by the counsel for the appellants, and that their argument was addressed to the House on the footing that the building which the appellants have erected at Hampstead, cannot be used for the treatment of persons suffering from small-pox without occasioning that which is, both in fact and law, a nuisance to the respon-

dents. In that case, it seems to be clear that if the appellants acted in a private capacity, and without legislative sanction, they could not successfully impeach the judgment of Baron Pollock, confirmed by the Court of Appeal. That proposition I did not understand the appellants to contest; but they allege that in providing a small-pox hospital at Hampstead they did no more than carry out the orders of the Local Government Board; and they maintain that the board had full power, under the Metropolitan Poor Act, 1867, to order the erection and use of the building for the treatment of small-pox without reference to any nuisance thereby occasioned.

In these circumstances it was rightly represented on both sides of the bar that the legal issue before the House depends upon the construction to be put upon the enactments of the statute of 1867. But I think it expedient, before dealing with the enactments of the statute in question, to consider shortly what kind or degree of statutory sanction is sufficient to justify the creation of a legal nuisance.

The judgment of this House in *The Hammersmith Railway Company v. Brand* ⁽¹⁾ determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner *contemplated [212 and sanctioned by the act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the act provides for such compensation being made. Accordingly the respondents did not dispute that if the appellants or the Local Government Board had been, by the Metropolitan Poor Act, 1867, expressly empowered to build the identical hospital which they have erected at Hampstead, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the act either to themselves or to the board; but they contend that, having regard to the nature of the public duties laid upon them, and the necessities of the case, it must, on a fair construction of the act, be held that the Legislature did intend them to exercise, and authorize them

(1) Law Rep., 4 H. L., 171.

to exercise, such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that, wherever it can be shown to be matter of plain and necessary implication from the language of a statute, that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons laboring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the act, provided that it were either apparent or proved to the satisfaction of the court that the directions of the act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the act was passed.

On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain [213] use of a *specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put

into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose.

To return to the statute upon the terms of which the appellants seek to justify the nuisance which they must, for the purposes of the present case, be held to have established at Hampstead.

The objects of the act of 1867 are various, but they all relate to the relief of the legal poor within the metropolis, and include the establishment of "district asylums for the reception and relief of the sick, insane, infirm, or other class or classes of the poor chargeable in unions or parishes." So far as regards this last object the act seems to have been designed to supplement, if not to supersede, certain provisions of 7 & 8 Vict. c. 101, which made it lawful for the Poor Law Commissioners, in the cases of London and each of five other large cities in England, to combine parishes *and [214 unions into districts for the purpose of providing and managing asylums for the temporary relief of the destitute houseless poor. The machinery enacted by the statute for carrying out that object is very similar to that which is provided in regard to asylums by the act of 1867.

The clauses of the act of 1867, so far as these relate to asylums, are not complicated or ambiguous. Sect. 5 declares in general terms that asylums, to be supported and managed according to the provisions of the act, "may be provided" for the reception and relief of the poor, or classes of poor, already mentioned; and in furtherance of that purpose it is declared by sect. 6 that the Poor Law Board "may from time to time" combine into districts unions or parishes, or unions and parishes, in the metropolis. By sect. 7 it is imperatively enacted that "for each district there shall be an asylum or asylums, as the Poor Law Board may from time to time by order direct." These enactments are followed by clauses which provide for the constitution of a body of managers for each district formed under the act. Then comes the 15th clause, which enacts that "the Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build (and in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such a plan and in such manner as the Poor Law Board shall think fit." I assume that the words of the preceding clause are sufficient to confer, by implication, the

same powers in regard to the purchase of a site which are expressly given in relation to the purchase of a building.

The other clauses requiring notice are the 17th, which empowers the managers to meet the expenses incurred in the execution of sect. 15, by borrowing on the security of the poor-rates of the unions and parishes comprehended in their district a capital sum to be repaid out of these rates by equal annual instalments not exceeding twenty, and also sects. 16, 51, 52, and 53. I shall not examine these four sections in detail, it being sufficient for the purposes of this case to state that their effect is to give the managers powers (1.) to acquire lands and buildings for the purposes of sect. 15 by voluntary purchase, no compulsory powers being given except "for the purchase of lands 215] for the purpose of *enlarging a workhouse, hospital, or school, existing at the passing of this act;" (2.) to acquire such lands and buildings by voluntary purchase from persons under legal incapacity; and, (3.) to use certain short statutory forms of conveyance.

Such being the substance of the enactments in the statute of 1867 which have a material bearing upon the present question, I am unable to find in them anything to support the plea that the Legislature thereby intended to authorize, in any case, the creation of a nuisance. I assume that the Hampstead Asylum has been erected in pursuance of the act—in this sense, that the procedure prescribed by the statute has been strictly followed, both by the Local Government Board, standing in place of the Poor Law Board, and by the managers. There is no question as to the *bona fides* both of the board and of the managers. It is clear that they acted in the honest belief that all they did was for the benefit of the community, and within their statutory powers. But that will not avail if the act does not empower either of them, or both, in conjunction, to erect an asylum to the nuisance of neighboring proprietors. These powers appear to me to be from first to last permissive and not imperative. Whether they shall be exercised at all, and, if so, to what extent and effect their exercise shall be carried, is left to the discretion of the Local Government Board. No doubt, the language of sect. 7 is imperative, and that is a circumstance upon which the appellants were fairly entitled to argue in support of their contention. But it is, in my opinion, a conclusive answer to their argument that, in the first place, the board is not bound to form a district, and in the second place, if they do see fit to form a district in terms of sect. 6, they are under no statutory compulsion to establish an asylum for small-

pox patients by reason of the provisions of sect. 7, but have ample means of satisfying these provisions by the erection and use of an asylum or of asylums which do not constitute a nuisance to anybody. So far as regards a small-pox hospital, the discretion committed to the board is not limited to determining on what site, of what size, and according to what plan it shall be built, but involves the duty of considering and determining whether it shall be built at all.

The appellants, in support of this construction of the act *founded strongly upon sect. 69, sub-sect. 2, which [216 provides that expenses incurred for "the maintenance of patients in any asylum specially provided under this act for patients suffering from fever or small-pox," shall be repaid out of the common poor fund. But that provision is not meant to add, and cannot be held to add to the powers previously conferred. It is not disputed that an asylum shall be provided and used for the treatment of small-pox patients, if no nuisance is thereby occasioned; and all that the Legislature has enacted by sect. 69, is that if when such an hospital has been lawfully established, the expense of maintaining patients in it, shall be defrayed out of a common fund raised by contributions from all the parishes and unions comprised in the district, and not by the parishes or unions to which they are severally chargeable.

The clauses in question belong to a class of enactments of which abundant examples are to be found in the statute book, the main object of which is to legalize the application of public rates to purposes which would otherwise be *ultra vires* of the bodies by whom these rates are administered. Such purposes are in themselves lawful; but it is not lawful to expend the money of the ratepayers without the express sanction of Parliament. And it appears to me that, in making provision with regard to asylums in the metropolis, the Legislature has done nothing more than is requisite to place the authorities to whom it has committed the execution of that part of the act, upon the same level as individuals in so far as the rights of third parties are concerned, but with the right, which individuals have not, to defray the costs by rates levied from the public.

I am accordingly of opinion that the judgments under appeal ought to be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th March, 1881.

Solicitors for appellants: *Few & Co.*

Solicitors for respondents: *Bischoff, Bompas, Bischoff & Co.*

A watercourse is real property, and the right to have water flow in it is incidental and appurtenant thereto. If it be conceded that plaintiff does not own the corpus of the water until it shall enter his ditch, yet the right to have it flow into the ditch appertains thereto. It is an incorporeal hereditament appertaining to his watercourse: *Ditch Co. v. Canal Co.*, 2 Col. L. Repr., 473, Sup. Ct. Cal.; *Cary v. Daniels*, 5 Metc., 236; *Gardner v. Newburgh*, 2 Johns. Ch., 162; 7 Amer. Dec., 526, 531, notes and cases cited; *Brooklyn v. McIntosh*, 133 Mass., 215.

A company which purchases the land of a riparian owner stands in the same situation as he did with respect to the water rights connected with that land.

A canal company was established by certain acts of parliament. The acts gave the canal proprietors rights as to taking water from streams within the distance of 2,000 yards, for the purpose of making and maintaining the canal. They purchased a mill on a stream, from which stream they had the right to take water. In this way they became riparian owners. As such they were entitled to the flow of water from brooks and streams running into that stream, subject only to the rights which other riparian owners at the upper part of the stream might lawfully exercise.

The directors of a waterworks company purchased a mill on the upper part of the same stream, and so became riparian owners as the owner of that mill had been. They not only used the water for the purposes and in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, and claimed, as their legal right, such a user of it. Held, that this use of the water by the directors of the waterworks company was not a reasonable use of the stream such as could justifiably be made by an upper riparian owner, and that the canal proprietors, who were also riparian owners, whose flow of water was thereby affected, were entitled to come into equity, and obtain an injunction to restrain this use of the water.

The canal proprietors had previously sold some of the water to the inhabitants of the town and others.

Per Lord Hatherley: Though that might be in excess of the powers given the canal proprietors by their acts, it formed no excuse for what had been since done by the waterworks company: *Swindon Waterworks Co. v. Wilts and Berks Canal Nav. Co.*, L. R., 7 H. L., 697, 14 Eng. R., 80; varying S. C., L. R., 9 Chy., 451; 9 Eng. R., 546.

In *Ormerod v. Tedmorden Mill Co.* (11 Q. B. Div., 155, 28 Albany Law Jour., 349), it was held that "a riparian owner cannot, except as against himself, confer on one who is not a riparian owner, any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful, if it sensibly affects the flow of the water by the lands of other riparian proprietors."

In *Swindon Waterworks v. Wilts Canal Co.* (14 Eng. Rep., 91-3), Lord Cairns said: "Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before.

Again, it may well be that there may be a use of the water by the upper owner for, I will say manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes

connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use, would depend at all events, in some degree, on the magnitude of the stream from which the deduction was made for this purpose, over and above the ordinary use of the water.

But, my Lords, I think your Lordships will find that, in the present case, you have no difficulty in saying whether the use which has been made of the water by the upper owner, comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. *Those were* cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire watershed of the country, and in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north. My Lords, that is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties, who have no connection whatever with any part of the stream.

Therefore, my Lords, so far as regards the position of the respondents as riparian owners, it appears to me that they clearly have a right to complain of that which is done by the appellants, if what is so done by them is insisted upon as a thing which they have a right to do. I put this qualification, because, if when the attention of the appellants had been called to what they were doing, they had not insisted upon doing it as a matter of right, I can well understand that if the Court

of Chancery found (I still speak of the position of the canal proprietors as riparian owners) that no sensible damage had occurred to them, it might not have thought it necessary to interfere with them by an injunction or declaration. But what your Lordships find here is that even upon this point of ownership, when challenged by the respondents, the appellants have made this claim, 'We admit that we intend (unless enjoined by injunction from so doing) to continue the diversion of the said Wroughton stream into our said reservoir, for our own purposes and profits, whenever the demand on us for water requires us to do so.'

My Lords, after that, it appears to me that it is impossible that the court can do otherwise than decide the issue which is thus raised between the parties. It is a matter quite immaterial whether as riparian owners of Wayte's tenement, any injury has been sustained or has not been sustained by the respondents. If the appellants are right, they would, at the end of twenty years by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration as the case may be."

The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation: *Pumpelly v. Green Bay, etc.*, 13 Wall., 166; *Jones, etc., v. U. S.*, 48 Wisc., 385; *McKenzie v. Mississippi*, 29 Minn., 288.

A diversion of a watercourse by the authority of a riparian proprietor, to enable a company to supply, in part, a village with water, is a legal wrong to another riparian owner, who thereby sustains a perceptible and substantial damage. As between co-proprietors, such a diversion is not a reasonable use of the common property. Such a diversion will be restrained by injunction: *Higgins v. Flemington Water*

Co., 86 N. J. Eq., 588; *Gardner v. Village of Newburgh*, 2 Johns. Ch., 162; 7 Amer. Dec., 526, 531 note.

The riparian owners of lands adjoining fresh water, non-navigable streams, take title to the thread of the stream, and as incident to the title acquire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream.

This is so also as to the fresh water navigable streams and small lakes within this State where the tide does not ebb and flow; save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the State, is inalienable and gives to the State the right to use, regulate and control the waters for the purposes of navigation.

This public easement gives the State no right to convert the waters, or to authorize their conversion to any other uses than those for which the easement was created, i.e., for the purposes of navigation.

The right to divert the waters for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making "just compensation."

Plaintiffs are the owners of certain premises, on the banks of Honeoye creek, used and occupied by them for milling purposes, and their mills are operated by the waters of the stream; said creek is a fresh water, non-navigable stream, formed by the junction of the surplus waters of three small inland lakes; one of these, Hemlock lake, is about seven miles in length, and one-half mile in width; it is to a certain extent navigable, and has for many years been navigated for local purposes by those living upon its shores. Said lake and the lands adjoining and the plaintiff's premises are included in the territory of which the proprietorship was ceded by this State to Massachusetts, by the treaty of 1786.

Under the authority of the act, chap. 754, Laws 1873, defendant constructed a conduit from the said lake to the city, for the purpose of furnishing water for the inhabitants of the city, which conduit draws from the lake 4,000,000 gallons of water daily. In an action to

restrain the continued diversion of the surplus waters of the lake from said creek,—held, that conceding the lake was part of the navigable waters of the State, and subject to all the rules pertaining to such waters, and that the State by the act aforesaid conferred upon the defendant all of the rights in the lake which remained in the State subsequent to the treaty, it imposed the same liability to those who might be injured by defendant's use of such waters, as the State itself would have incurred for a similar use; that the diversion of the waters for the purpose specified was for an object totally inconsistent with their use as a public highway, or the common right of all the people to their benefits; that the State had no right, and by the said act did not attempt to grant a right, to such use, to the detriment of the riparian owners upon said creek, and without making compensation; and that, as the evidence tended to show, plaintiffs were injured by the diversion complained of, a dismissal of their complaint was error.

The rights of the riparian owners upon the Hudson (aside from its tidal character) and the Mohawk rivers, are affected by the doctrines of the civil law prevailing in the Netherlands, from whose government they were derived, and are distinguishable from the rights of riparian owners upon other navigable waters of the State: *Smith v. Rochester*, 92 N. Y., 463.

A city is liable to one navigating a public river, for drawing therefrom so as to injure navigation: *Philadelphia v. Collins*, 68 Penn. St. R., 106; *Philadelphia v. Gilmartin*, 71 id., 140.

The St. of 1871, c. 133, authorized a city to take the waters of a great pond for the purpose of supplying its inhabitants with pure water; and provided that the city should be liable to pay all damages that should be sustained by any person in his property by the taking of said waters, or by the taking of any land or water rights.

Under the authority of this statute, the city passed an order taking a certain quantity per day of the waters of the pond: Held, that an owner of a mill privilege on a river half a mile long, which was the outlet of the pond, could maintain a petition, under the

statute, for an assessment of the damages to his privilege by the taking by the city of the waters of the pond.

The St. of 1871, c. 133, authorized a city to take the waters of a great pond for the purpose of supplying its inhabitants with pure water; and provided that the city should be liable to pay all damages that should be sustained by any person in his property, by the taking said waters or by the taking of any land or water rights.

Under the authority of this statute, the city passed an order taking a certain quantity per day of the waters of the pond. A company had been previously incorporated "for the purpose of constructing a reservoir of water in" the pond "for the benefit of the manufacturing establishments on" a river which was the outlet of the pond; and it had power to build a dam so as to raise the water in the pond to a certain height. Its capital stock had always been owned, and it had been managed, by the mill-owners on the river, each of whom owned the privilege attached to his mill:

Held, that the corporation could maintain a petition for any damage to its dam or other property caused by the taking by the city of the waters of the pond; and that each mill-owner was the proper party to bring a petition for damages to his privilege by such taking.

Held, also, that the city was liable for depriving the petitioners of water used for other purposes, as well as for power.

Held, also, that a corporation, whose lands did not border on the stream, but to whose mill water was conveyed by a canal running through the land of a riparian owner, under a deed giving the right to the flow of water from the stream, had the same rights against the city as the riparian owners: *Wautuppa Reservoir Co. v. Fall River*, 184 Mass., 267.

A municipal corporation will be restrained by injunction from fouling the waters of a natural stream by emptying the contents of sewers into it: *Beach v. City of Elmira*, 22 Hun, 158; *Carhart v. Auburn Gas Co.*, 23 Barb., 297; *Wendell v. Troy*, 4 Abb. App. Dec., 563, 566-7, 4 Keyes, 261; *Hardy v. Brooklyn*, 90 N. Y., 435, 441-2.

Even though it use a natural stream, and though it only collect surface

water: *Sleight v. Kingston*, 11 Hun, 594, 596-7; *Noonan v. City of Albany*, 79 N. Y., 470, 476-8; *Byrnes v. Cohoes*, 67 N. Y., 204, 5 Hun, 602; *Smith v. Alexandria*, 33 Gratt. (Va.), 208.

The general rule in such cases is, that the court will award an injunction and not damages: *Clowes v. Staffordshire Potteries*, L. R., 8 Chy., 142, 4 Eng. Rep., 820-1; *Pennington v. Brinsop Hall Coal Co.*, L. R., 5 Chy. Div., 772-3, 22 Eng. Rep., 452-4.

In *Imperial Gaslight Co. v. Broadbent* (7 H. L., 612), Lord Kingsdown, after referring to the chancery rule that if plaintiff's right be denied he could be sent to law to establish it, proceeds: "But when he has established his right at law, I apprehend that unless there be something *special* in the case, he is entitled, as of course, to an injunction to prevent the recurrence of that violation."

The distinction between cases of light and air and water, pointed out in *Pennington v. Brinsop*, etc., 22 Eng. R., 453, should be borne in mind in considering cases of light and air merely.

The proper remedy is by injunction; *Beach v. Elmira*, 22 Hun, 158, 162; *Campbell v. Seaman*, 63 N. Y., 518; *Penn. Coal Co. v. Saunderson*, 94 Penn. St., 302.

"The right of a riparian owner to have the waters of the stream flow through or by his land in its natural purity and without appreciable pollution caused by owners above him, is well settled, is a part of his property, and will be protected by injunction. Nor is this right modified by the fact that the flow of the stream has been increased by reservoirs built along the upper course": *Selvin Spring, etc., v. Waushuck Co.*, 13 R. I., 611.

"The defendant contends that, according to general principles of the common law, the plaintiff has a complete remedy upon the facts alleged by him, and that he should be compelled to resort to his action at law before seeking relief in equity. But it is quite clear that a bill in equity may be maintained by a riparian owner to restrain another from polluting the stream to the plaintiff's material injury (*Merrifield v. Lombard*, 13 Allen, 16; *Woodward v. Worcester*, 121 Mass., 245). The acts of the defendant, as alleged, tend to create a nuisance of a

continuous nature for which an action at law can furnish no adequate relief": *Harris v. McIntosh*, 133 Mass., 230; *Henderson v. N. Y. Central*, 78 N. Y., 430-2, 17 Hun, 344, 349; *Fox v. Fitzsimmons*, 29 id., 574, 578.

One who is injured by the deposits in a public river of mash from a brewery sustains a special injury, which entitles him to maintain an action for its suppression: *Mayor v. Bamberger*, 7 Rob., 219.

A riparian proprietor has no right, in the absence of express grant or prescription, to pollute the waters of a stream and make it unfit for drinking purposes: *Dwight, etc., v. Boston*, 122 Mass., 583.

"An attempt to enter upon and take permanent possession of land for public use without the assent of the owners, and without the damages having been ascertained or tendered, may be restrained by injunction": *Church v. Joint, etc.*, 55 Wisc., 400.

It is in the nature of an irreparable injury, for the prevention of which the writ of injunction constitutes the proper remedy: *Church v. Joint, etc.*, 55 Wisc., 403-4; *Campbell v. Seaman*, 63 N. Y., 568; *Moak's Underhill on Torts*, 103-4.

A disturbance or deprivation of the rights of a riparian owner to the use and enjoyment of a stream of water in its natural state, is an irreparable injury for which an injunction will issue. A deprivation of the use of a stream by corrupting it so as to render it unfit for use is an equally irreparable injury, entitling the party injured to the like preventive remedy: *Holsman v. Boiling Spring, etc.*, 14 N. J. Eq., 335.

"When the supervisors of a town threaten to enter upon and permanently occupy land for a public highway against the will of the owner, and without having acquired a right thus to insist by proceedings taken for that purpose under the statute, such owner is entitled to an injunction to prevent the injury": *Wren v. Walsh*, 57 Wisc., 26, 101-2.

In *Johnson v. City of Rochester*, 13 Hun, 285, the court at general term said: Although the general rule is that an injunction will not be granted to restrain a mere trespass, without special equitable features in the case, it is well settled that such equitable

features exist when there is vexation from repeated or continued trespass in the nature of a nuisance, or when the wrongful acts, continued or threatened to be continued, might become the foundation of adverse rights, and would occasion a multiplicity of suits to recover damages: *The Mohawk & Hud. R. R. Co. v. Archer*, 6 Paige, 83; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y., 97.

In *Ormerod v. Todmorden Mill Co.* (11 Q. B. Div., 155, 28 Alb. L. J., 349), defendants claimed they took out of the stream thirty-eight feet of water per minute, and returned thirty-seven feet per minute, the court (11 Q. B. Div., 159, 28 Alb. L. J., 350,) said: "The first contention of defendants was, that proof of substantial damage was necessary to the maintenance of the action, and consequently, that upon this finding they are entitled to the verdict. Now, whatever the case might be, if what is here complained of had been done by the defendants accidentally on a single occasion, I am of opinion that as the defendants claim to do this continuously as a matter of right, it is not necessary for plaintiffs to prove they have sustained *actual* damage (*Wilts v. Swindon, etc.*, L. R., 9 Chy., 451, L. R., 7 H. L., 697). If twelve other persons were to use the water in the same way and to the same extent as the defendants, it cannot be doubted that the plaintiffs would sustain substantial and serious injury; yet if this contention of the defendants is correct, the plaintiffs would have no remedy against any one of the thirteen, because no one of them alone caused substantial damage. If I am right in this view, it is incumbent on the defendants to justify their interference with the plaintiffs' rights by showing that they are themselves riparian owners, in which case the finding of the jury in answer to the second of the above questions would entitle them to the verdict, or that if not riparian owners, they are nevertheless entitled to affect the plaintiffs' rights to the same extent as they might have done if they were riparian owners."

The court also said (28 Alb. L. J., 351), "A riparian owner cannot, except as against himself, confer on any one who is not a riparian owner, any right to the use of the water of the stream, and that any use of the stream by a

non-riparian proprietor, even under grant from a riparian proprietor, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors."

In that case defendants used some of the water of a stream at their mill, returning it to the stream in a somewhat heated condition. The court held (28 Alb. L. J., 352), "There must therefore be judgment for the plaintiffs, with costs, and an injunction to restrain the defendants from continuing to convey the water to Fielding, or permitting him to take it through their pipes." Plaintiffs did not appeal, so that the question whether or not they ought to have been awarded greater or fuller relief was not raised.

An owner of land is entitled to the equitable interference of the court in his behalf to restrain and prevent an illegal entry thereon, whenever the damages which might be recovered in an action at law would be inadequate to compensate for the injury which would be sustained from the trespass. (*Story's Eq. Jur.*, § 918; *Livingston v. Livingston*, 6 Johns. Ch., 497; *Carpenter v. Gwynn*, 35 Barb., 395; *West Point Iron Co. v. Reymert*, 45 N. Y., 705; *Watson v. Sutherland*, 5 Wallace, 74.)

The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction.

Legal compensation refers solely to the injury done to the property taken and not to any consequential damages.

In this case it is apparent that the consequence of the threatened trespass would have been very serious to the plaintiff, and one for which an action at law would not have given an adequate remedy, as the injury to plaintiff's business could not be correctly estimated or ascertained.

Under our system of practice the legal right to the property may be established and the equitable remedy afforded in the same action (*Broiestedt v. L. L. R. Co.*, 55 N. Y., 220).

The remedy by injunction was, therefore, appropriate and fully warranted by the facts of the case: *Mubry v. Norton*, 29 Hun, 660, 666-7.

An injunction is the proper remedy in case of an injury to real property permanent in character, where the damages resulting are continuous in

their nature, and especially where from the nature of the act and the injury suffered it is impossible or difficult to ascertain and determine the extent of the injury which may flow from a continuance of the wrong: *Poughkeepsie Gas Co. v. Citizens Gas Co.*, 89 N. Y., 493, 497, affirming 20 Hun, 214; *Adams v. Popham*, 76 N. Y., 410; *Milburn v. Fowler*, 27 Hun, 568; *Merrifield v. Lombard*, 13 Allen, 16, 18.

An injunction is the only effectual remedy where the injury is caused by so many that it would be difficult to apportion the damages or say how far any one may have contributed to the result, and so damages would likely be but nominal, and repeated actions, without any substantial benefit, might be the result: *Woodyear v. Schaefer*, 57 Md., 1.

A riparian proprietor is entitled to the waters of a stream for any legitimate purpose other than power: *Wautuppa, etc., v. Fall River*, 134 Mass., 267.

Public works, ordered by acts of parliament, must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer (e.g., by remaining undrained) unless his rights are invaded, is one which this court cannot take into consideration.

The council of the borough of Birmingham were bound by a local act of parliament, incorporating The Towns Improvement Clauses Act (10 and 11 Vict., c. 34), effectually to drain the town: Held, that they were not justified in so carrying on their operations for this purpose as to drive away fish, and prevent cattle from drinking of the water of a river at a part seven miles below the town, and where it belonged to the plaintiff.

Held, also, that, assuming the inhabitants of Birmingham to have had before their act a right to drain their houses into the river, that circumstance would not authorize the council in discharging the sewage in such manner as to subject the plaintiff to the inconvenience of which he now complained: *The Attorney-General v. Birmingham*, 4 K. & J., 258.

Such damages as are incident to, and necessarily result from, a proper use of

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the water must be borne; but the manufacturer has no right to do any act that, in its consequences, is injurious to others, because it is a matter of convenience or economy for him to do it. It is as much the duty of a manufacturer to so dispose of his waste as not to injure others, as it is to refrain from injuring others by any other act. No one is allowed to deposit any substance in a running stream that will pollute its waters to the injury of a riparian proprietor below. *Wood v. Sutcliffe*, 8 L. & Eq. R., 217; *Goddard's Law of Easements* (Bennett's edition), 67 and 258. Neither has any one the right to deposit any other substance in such a stream, beyond what is absolutely necessary to a beneficial use of it, to the injury of mill-owners or the lands through which the stream may run. It would be manifestly unjust to hold that a manufacturer could so conduct his business as to seriously impair the value of the rights and property of other manufacturers on the same stream below, and injure or perhaps ruin lands of riparian owners without accountability, upon the showing that it was more convenient and economical to him thus to conduct it.

The acts of the defendants, in depositing the waste made at their mill in the manner we have found it has been done, were illegal, and a perpetual injunction will be issued, enjoining them, their heirs, executors, administrators and assigns from so disposing of it in the future: *Canfield v. Andrew*, 54 Verm., 1, 16.

Even though the authorities of a city may be under a legal duty to afford sufficient drainage for the health and comfort of the inhabitants, and, in the discharge of such duty, construct a sewer or drain after the most approved plan, using the best material, and the work is done in the most skilful manner, yet they have no right thereby to concentrate the dirty water, offal, and filth of the city or any portion thereof, and discharge the same upon the premises of an individual; and if in so doing a private injury is sustained, the city will be liable for the damages. It must so construct such improvement as to avoid injury to individual property.

Where a city constructed a sewer so that the garbage, suds and slops, offal and filth from the dwelling houses and

woolen mills by which it run, was conducted, discharged, and flowed upon and through the real estate of the plaintiff, situate in the city and near the terminus of the sewer, corrupting and polluting the atmosphere so as to render the land unsalable and unsuitable for residences, and otherwise injure the use of the land or a portion thereof: Held, that the city was liable to the plaintiff in case, for the damages sustained.

If in abating or removing a public nuisance by a system of sewerage or drainage, it unavoidably inflicts an injury to private property, the corporate authorities should, by condemnation or otherwise, make compensation for the injury: *City of Jacksonville v. Lambert*, 62 Ill., 519.

A hydraulic company operated a woolen mill propelled by water supplied by an artificial race, the water from which was used also in coloring the goods manufactured,—pure water being required for that purpose. A city incorporated under said act of 1867 was rapidly cutting a ditch for the draining of its streets, to discharge into said race, which would so contaminate the water thereof with filth as to make it unfit for coloring; and this would be accomplished in two or three days, if not arrested; and it would also carry sand into said race, obstructing the flow of the water to the mill. Said city was making said ditch as a part of the work of grading a certain street according to a new and changed grade thereof, a different grade having been previously established, and the damages to said company resulting from such change of grade had not been assessed or tendered. Said race at a point of intersection with the proposed ditch was outside of the city, its margin being the boundary of the city.

Held, that said company was entitled to an injunction to prevent the city from cutting said ditch into the race, the majority of the court basing this conclusion on said provision of section 27 of the act of 1867; *Elliott, J.*, holding that the fact that the city was changing the grade of the street did not affect the question, but that the city had no authority or right to conduct the drainage of its streets into the race, the private property of said company, and thereby destroy the use

for which it was constructed, nor could such power be conferred except by the exercise of the right of eminent domain: *City of Columbus v. Hydraulic*, etc., 33 Ind., 435.

Nor is it any defence that the damages are small.

A writ of injunction can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case is error to be corrected in an appellate court.

Where one manufacturing brick upon his lands uses a process in burning by which noxious gases are generated, which are borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, this is a nuisance, and the party injured may maintain an action to recover damages and to restrain the use of the process complained of.

It is immaterial that the damage done is to ornamental trees and shrubbery only; articles of luxury are as much under the protection of the law as articles of necessity.

So, also, it is immaterial that the injury is only occasional. It is sufficient to authorize an injunction that injury may be expected whenever a kiln is burning, unless the poisonous gases are blown away from plaintiff's land.

It does not affect plaintiff's right to an injunction that the brick yard was used before plaintiff purchased his land. *Campbell v. Seaman*, 63 N. Y., 568.

In a suit by a stockholder, it is not a defence that the interest of the stockholder complaining is small, nor that to save the association from loss, it was necessary to make it.

A stockholder may maintain an action in form in behalf of himself and all others similarly situated, though he be opposed by every other stockholder in the corporation: *White v. Carmathen R. R. Co.*, 1 Hem. & Miller, 786; *Burt v. British*, etc., 4 De Gex & Jones, 158.

Though every other shareholder may be opposed to him, any single shareholder has a right to institute a suit, in behalf of himself and all other shareholders who have a common interest with himself, to restrain the application of the common funds of the company to any other purpose than the proper pur-

poses of the concern, and a court of equity will interpose in his behalf by injunction. The amount of interest of the complaining shareholder will not be taken into consideration: *Burt v. British*, etc., 4 De Gex & Jones, 158; *Kerr on Inj.*, 548; *Butts v. Wood*, 37 N. Y., 817, 38 Barb., 181; *Lyde v. Eastern*, etc., 36 Beavan, 10; *Dance v. Goldingham*, 7 Eng. R., 461, L. R., 8 Ch., 902.

If the rules of law or equity entitle a party to a final judgment awarding a particular remedy or relief, it is immaterial how small his interest is, or his damages may be, or whether, as for instance on an injunction to restrain the use of water, he has any use for the property affected by the judgment: *Schenck v. Ingraham*, 5 Hun, 397; *Crooker v. Bragg*, 10 Wend., 260; *Corning v. Troy*, etc., 34 Barb., 485, 39 id., 311, affirmed 40 N. Y., 221; *Hammond v. Fuller*, 1 Paige, 197; *Goodson v. Richardson*, 8 Eng. R., 835, L. R., 9 Ch., 221.

It is no reason why a party should be denied a proper judgment, "that the detention of the water was no injury to the defendant, or that he insisted upon his legal rights to the water, from bad motives, or purposes of annoyance": *Clinton v. Myers*, 46 N. Y., 511.

"In actions for the diversion of water, where there is a clear violation of an established right and a threatened continuance of such violation, it is not necessary to show actual damages or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual": *Brown v. Ashley*, 18 Nev., 311, 815-7.

The fact that plaintiff's interest in the premises is nominal and of trivial consequence, is not a reason for refusing an injunction against the permanent obstruction of a park or street in which he has an easement: *Foster v. City of Buffalo*, 64 How. Pr., 127, affirmed General Term.

In this case the court said (p. 182), "Upon the argument it was contended, on the part of the city, that the value of the interest of the plaintiff in the premises was nominal and of trivial consequence, and that the city ought not to be delayed in taking possession of the premises. I do not understand that the courts have any discretion in

the matter. The rule of law is the same, whether their interests are worth six cents or \$600. Until they have received the value thereof and their interests is extinguished, the city has no right to take possession of their property. The injunction should be continued until the city acquires the title to the premises."

In *Pennington v. Brinsop Hall Coal Co.* (L. R., 5 Chy. Div., 769, 22 Eng. Rep., 450), a colliery company above strongly impregnated the waters of a stream with sulphuric acid and other deleterious matters. The colliery company opposed the granting of an injunction, but one was granted, the court holding (22 Eng. Rep., 453-4) that "the injury to running water proceeds from a cause which varies from day to day, and may cease or may increase at any time." A case was cited (22 Eng. R., 454) where the damages were only nominal, but "it was held that an injunction ought to issue, upon the ground of the inconvenience of leaving the parties to repeated and successive actions for damages." It was urged (22 Eng. R., 454) that an injunction would result in stopping the defendants' works and throwing out of employment a large number of workmen. The court held that to be no reason why the plaintiff should not have an injunction.

The plaintiffs, in common with the other inhabitants of a particular district, enjoyed a customary right at all times to have water from a certain spout in a highway in the district for domestic purposes. The defendant, a riparian owner on the stream whereby the spout was supplied with water, on various occasions, prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. The plaintiffs had not themselves ever suffered any actual personal damage or inconvenience:

Held, that an action for diverting the water was maintainable without any actual personal damage, inasmuch as the act of the defendant might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiffs' legal rights, *Harrop v. Hirst*, L. R., 4 Exch., 43.

A perpetual injunction may be granted to restrain the nuisance from

pollution of a stream if it is of a continuous nature, even when the plaintiff could only recover nominal damages at law, because of the inconvenience of repeated and successive actions, and of the acquisition of an adverse right to pollute by the continuance of the act for twenty years: *Clowes v. Staffordshire*, L. R., 8 Chy., 125, 143, 4 Eng. Rep., 807, 820-1; *Goldsmid v. Tunbridge Wells*, etc., L. R., 1 Chy., 349, 355-8.

The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without showing that the fouling is actually injurious to him. *Crossley*, wishing to prevent the water of a river from being fouled by some dye works, purchased from the owners of the dye works a piece of land on the banks of the river without communicating to them his object. Held, that in the absence of any express reservation by the owners of the dye works of the right of fouling, *Crossley* could maintain a suit to restrain it: *Crossley v. Lightowler*, L. R., 2 Chy., 478, L. R., 3 Eq., 279.

In this case Lord Chelmsford said (L. R., 2 Chy., 488): "From what has been already said, it may be collected that in my opinion if the plaintiffs had proved the pollution of the Hebble opposite to their mills by the defendants they would have had good ground for an injunction, although they were not actually using the water for their business."

In *Goldsmid v. Tunbridge Wells*, etc. (L. R., 1 Chy., 354-5), *Turner, L. J.* said: "This brings us to the question, whether the nature and extent of the nuisance in this case is such that this court ought to interfere by injunction to prevent it. I have throughout felt this point to be one of some difficulty. I adhere to the opinion which was expressed by me and by the Lord Chancellor in *The Attorney General v. Sheffield Gas Consumer's Company*, 3 D. M. & G., 304, that it is not in every case of nuisance that this court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow

from it. In this particular case, I think that regard must be had not merely to the comfort or convenience of the occupier of the estate, which may only be interfered with temporarily and in a partial degree, but that regard must also be had to the effect of the nuisance upon the value of the estate, and upon the prospect of dealing with it to advantage; and I cannot but think that the value of this estate, and the prospect of advantageously dealing with it, is and will be affected by the continuance of this nuisance. Upon this ground, and upon the ground of the water of the brook being rendered unfit for the use of the tenants and occupiers of the estate, I think that the interference of the court in this case was due."

In *Swindon Waterworks v. Wilts.*, etc (14 Eng. Rep., 99-100), Lord Cairns said: "I think enough has been made out to justify the interference of a court of equity in this case. A very slight case indeed would be sufficient after what the appellants have said. They have claimed the absolute right to sweep away the whole of the stream from the canal by the diversion they have made in the neighborhood of their works and their reservoir. A very slight amount of evidence of the actual amount of damage done would be sufficient to justify an injunction: and the declaration of right to be made by the court is absolutely necessary, in consequence of the assertion of right made by the appellants in this case, which is wholly contrary to the right asserted by the respondents, and which, if established, must give them a right to have it determined, ascertained and declared against persons who, like the appellants, profess their intention to dispute and to invade that right, unless they should be interfered with by the injunction of the court."

In a suit against a sewage company for an injunction for not properly disposing of sewage, no special damage was alleged and the company demurred, because no amount of damage was shown. The demurrer was overruled, the court saying that the fact that it was a nuisance was sufficient: *Nuneaton v. General Sewage Co.*, L. R., 20 Eq., 127.

In *Clowes v. Staffordshire Potteries*

(L. R., 8 Chy., 142-3, 4 Eng. Rep., 820-1), the court said, "Then comes the only other question, which I will deal with shortly. I cannot conceive that, an action at law being maintainable, relief is not to be had in this court. If this case had happened before Sir John Rolt's Act or Lord Cairns' Act, I presume the ordinary course would be that a bill having been filed, an action would have been sent to be tried at law. The action having been tried, nominal damages would have been obtained, and the plaintiff would have come back to this court for an injunction. Would this court have sent her away, and said that she should bring action after action, instead of having her remedy by injunction? I cannot think that would have been so. The Vice-Chancellor said, 'If you can recover at law at all, I think you will get no greater damages than would be sufficient to pay for a filter, and that would be a sufficient compensation.' But, with submission to the Vice-Chancellor, I do not think the plaintiff would get at law a sum sufficient to put up a filter. She would only get, in the first instance, nominal damages, because in a case of this sort you cannot prove specific damages, and there is no evidence here of specific damage, and upon that evidence you would only get, in the first instance, 40s. damage. Then you must bring a second action, and what you would get in the second action would be the actual damage which you had proved you had sustained between the time you brought the first and the second actions. Then you would bring a third action, and you would get as damages the actual damage which you could prove you had sustained between the time of bringing the second and third actions. It is because it is most inconvenient to leave the rights of parties to be determined in that way, and in fact impossible to leave it in that way, that this court has always in such cases given relief. In my opinion, therefore, the plaintiff is entitled to maintain this suit, and entitled to have a declaration that the acts of parliament have not given the defendants any legal right to foul the water, to her damage, and ought to have an injunction to prevent any such damage in future.

The sewage of a town had for many

years been drained, by commissioners acting under a local act of parliament, into a stream passing through the plaintiff's land, which was beyond their district, without perceptibly polluting it. But for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity. Decree of the master of the rolls restraining the commissioners from draining the town into the stream so as to pollute the water to the injury of plaintiff, affirmed. Although the fact of prospective nuisance is not in itself a ground for the interference of the court, yet if some degree of present nuisance exists, the court will take into account its probable continuance and increase: *Goldsmid v. Tunbridge Wells, etc.*, L. R., 1 Chy., 349, L. R., 1 Eq., 161.

All who command, advise, aid, assist or approve the commission of a wrong are equally liable with the one who does the act: 2 Greenl. Ev. § 621; *Judson v. Cook*, 11 Barb., 643, 644; *Davis v. Newkirk*, 5 Den., 92, 95; *Herrick v. Hoppock*, 15 N. Y., 409; *Ball v. Loomis*, 29 id., 412, 417; *Pozzoni v. Henderson*, 2 E. D. Smith, 146; *Latimer v. Wheeler*, 8 Abb. Dec., 35, 1 Kern., 468; *Connals v. Hale*, 23 Wend., 462; *Fonda v. Van Horne*, 15 id., 631; *Bryce v. Brockway*, 31 N. Y., 490, 493; *Wintringham v. Lafoy*, 7 Cow., 735; *Neff v. Thompson*, 8 Barb., 213; *Cooley v. Rose*, 2 N. Y., 115; *Farrer v. Chaufetete*, 5 Den., 527; *Bond v. Willett*, 1 Keyes, 380; *Miller v. Baker*, 1 Metc., 27; *Robinson v. Mansfield*, 13 Pick., 189; *Gibbs v. Chase*, 10 Mass., 125.

But see *Leshar v. Gilman*, 30 Minn.,

321; *McLeod v. Fortune*, 19 U. C. Q. B., 98.

Though trover will not lie against one who merely takes a mortgage: *Mattewan, etc., v. Bentley*, 13 Barb., 641.

See also *Fellows v. Hyning*, 23 How. Pr., 230.

The fact that the stream is fouled by others is not a defence to restrain the fouling by one: *Crossley v. Lightowler*, L. R., 2 Chy., 478.

It is no defence to a suit for an injury, in part caused by defendant, that others contributed to the injury: 28 Eng. Rep., 308 note; 30 id., 90 note.

It is no defence that so many other persons contributed to a nuisance that it would be useless to restrain the defendants: *Bonshad v. Prince*, 5 Wyatt, *Webb & A'Beckett (Eq.)*, 140; *Wood-year v. Schaefer*, 57 Md., 1.

In an action for wrongfully discharging refuse tanbark into plaintiff's pond, which was on the same stream and below the tannery, held that it was no defence that plaintiff might have prevented the pond from filling up by raising the slash boards on his dam or by opening a waste-gate. Nor that it was the custom of the country to discharge spent tanbark into the stream below tanneries: *West v. Kiersted*, 15 N. Y. Weekly Dig., 549, 28 Hun, 440, mem.

One who casts filth from sewers through a watercourse on lands of another, is not relieved from the responsibility by the fact that the injury is aggravated by an obstruction of the stream below the lands of the injured party: *Noonan v. Albany*, 79 N. Y., 470, 8.

[6 Appeal Cases, 217.]

H.L. (E.), Jan. 20, 27, 28; March 7, 1881.

[HOUSE OF LORDS.]

*WILLIAM SPAIGHT and JAMES SPAIGHT, *Appellants*; and ROBERT TEDCASTLE, *Respondent*. [217]

Sea Damage—Compulsory Pilotage—Steam-tug.

Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam-tug, the latter is bound to obey the orders of the pilot. In case of a mischief occurring to the vessel, occasioned directly by the conduct of the steam-tug, the tug (which had not noticed the pilot's signal), cannot in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the ground that if the pilot, when the mischief was about to happen, had himself done a certain thing, the mischief might possibly have been avoided.

Bland v. Ross (The Julia) (1) commented on, and approved.

APPEAL against a decision of the Court of Appeal in Ireland which had (*diss.* Lord Justice Fitzgibbon) affirmed a judgment of the Irish Court of Admiralty.

The appellants were the owners of a sailing ship the Ruby. The respondent was the owner of a steam-tug the Toiler. The Ruby coming from Quebec, arrived near the Kish lighthouse in Dublin Bay on the 9th of December, 1878. The weather was squally. The Toiler came up and proposed to take the Ruby into harbor. The Ruby had on board a licensed pilot, whom by the law of Dublin Harbor the master of the Ruby was bound to employ. He told the master of the Ruby that the terms offered by the tug were proper, and the tug was engaged. After the tug had begun the labor of towing, the master of the Ruby left the deck, his vessel being, as he thought, under the absolute control of the licensed pilot. In going into the harbor the Ruby ran upon a bank in the bay called the Burford Bank, and sustained injury. A proceeding *in rem* was instituted by the owners of the Ruby against the owners of the tug to obtain compensation for this *injury, which the [218] owners of the Ruby alleged had been occasioned by the fault of the tug. The owner of the tug put in defences which in substance set up a case of contributory negligence on the part of the Ruby, through the act of the pilot in not casting off the tow rope when the danger became imminent. The Court of Admiralty had sustained the defence, and on appeal the Lord Chancellor and Lord Justice Deasy agreed to affirm that decision, Lord Justice Fitzgibbon dissenting. This appeal was then brought.

(1) Lush., 231; 14 Moo. P. C., 210.

Mr. *Butt*, Q.C., and Dr. *Boyd*, Q.C. (of the Irish bar), were for the appellants.

Mr. *Cohen*, Q.C., and Mr. *Burke* (of the Irish bar), for the respondent.

The evidence, and its effect in supporting the defence of contributory negligence, are fully considered and commented on in the judgments.

THE LORD CHANCELLOR (Lord Selborne): My Lords, I have had an opportunity of seeing the detailed examination of the evidence in this case which will be submitted to your Lordships by one of my noble and learned friends (Lord Blackburn); and your Lordships have before you the full discussion which that evidence received from the learned judges in the court below. My view of the main conclusions to be derived from that evidence being the same with that taken by Lord Justice Fitzgibbon, and by my noble and learned friend, I do not think it necessary to occupy your Lordships' time by going in detail over the same ground.

There is an important point of law, which (for some reason, that I do not at present understand) was not argued at your Lordships' bar, but which it would have been necessary to consider, if your Lordships had taken the same view of the effect of the evidence which was taken by the majority of the judges in the court below. It seems to have been assumed that the plaintiffs, the owners of the [219] *Ruby*, would have been answerable for *contributory negligence, not only of their own captain and crew, but of the pilot, whose employment was compulsory by law. If, in any case which may hereafter occur, it should be necessary to determine that question, the statute 17 & 18 Vict. c. 104, s. 388, and the opinions delivered in this House in the recent case of *Clyde Navigation Company v. Barclay* (*) will require attention. But for the present purpose, I think your Lordships need not enter into that question; because even if the employment of the pilot had not been compulsory, the conclusions to be properly drawn from the facts established by the evidence would have been such as, in my opinion, to make that distinction immaterial.

Great injustice might be done, if, in applying the doctrine of contributory negligence to a case of this sort, the maxim, *causa proxima, non remota, spectatur*, were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established

(*) 1 App. Cas., 790; 18 Eng. R., 72.

merely by showing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect. The question is not whether it would have been wiser for the master of the *Ruby* to prevent the tug from taking such a course in the direction of the south buoy as might bring her so near as he actually came to the bank. If, taking that course (which the master of the tug on his own responsibility voluntarily and deliberately did), all danger might have been avoided by proper conduct and management on the part of both vessels at the proper time, the master of the *Ruby* was, in my judgment, entitled to assume that the master of the tug knew what he was about, and would do what was necessary to avoid getting too close to the bank, unless the contrary manifestly appeared. At the critical time the *Ruby* made all the *signs which [220] were possible to the tug; and if they had been followed, (as at first they were), I think it is the just conclusion from the evidence that no damage would have occurred. Upon the evidence I cannot see my way to hold that the *Ruby* then omitted anything which ought to have been done, or did anything which ought not to have been done.

My conclusion on the evidence is, that the judgment under appeal ought to be reversed; and I shall therefore move your Lordships to reverse it, and to remit the cause to the court below, with a declaration that the appellants are entitled to a decree for damages and costs, as prayed by the petition, together with the costs of the appeal below. And direct the respondent to pay to the appellants the costs of this appeal.

LORD BLACKBURN: My Lords, this was a cause of damage instituted by the appellants, as owners of the bark *Ruby*, in the High Court of Admiralty of Ireland, against the respondent, as owner of the steam-tug *Toiler*, to recover damages, because the *Ruby* was run aground on a shoal in the Bay of Dublin, called Burford Bank, in consequence, as is alleged, of the negligent performance of that duty which the owner of the *Toiler* had taken upon himself by having, through his master, named Cavanagh, entered into a con-

tract to tow the Ruby. It is not in dispute that a contract of towage was entered into, nor that, whilst the Ruby was being towed by the Toiler, she took the ground and sustained serious damage. And it is not in dispute that at that time the Ruby was in charge of a duly licensed pilot, by name Tallant, whom the Ruby was obliged to employ,—pilottage in the Bay of Dublin being compulsory.

The judgment delivered by Lord Kingsdown, in a case in the Privy Council, clearly and accurately states the law applicable here. I mean the case reported under the name of *The Julia* (°); and also under the name of *Bland v. Ross* (°). In that case the tug sued the ship for damages for a collision. Lord Kingsdown, in delivering the judgment of the Privy Council, says:

“When such a contract is made, the law would imply an engagement *that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each, and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action would arise; such an accident would be one of the necessary risks of the engagement to which each party was subject, and create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not, by any misconduct or unskilfulness on her part, contributed to the accident.”

He states the four questions which arose in that case. Three of them are material for the consideration of this case: “1. Did the accident arise from the misconduct of the ship? 2. Did the tug, by any misconduct on her part, contribute to the accident, or (what is in truth but another form of the same question) could she by using due diligence have avoided it? 3. If both of these questions are decided in favor of the tug, can the ship escape the consequences of her misconduct, on the ground that it is to be imputed solely to the pilot, and in no degree to the master or the crew?”

Those three questions were, in the case of *The Julia* (°), disposed of on the evidence. The first two, merely changing the parties from tug to ship, and *vice versa*, were disposed of in this case by the judge of the Admiralty and his assessors, who found first that the accident arose from the mis-

(°) Lush., 231. (°) 14 Moo. P. C., 210. (°) Lush., 231; 14 Moo. P. C., 210.

conduct of the tug. The *onus probandi* on this issue lay on the plaintiffs below, and as the duty of the tug was to carry out the directions received from the ship, and the pilot who was in charge of it, the tug would not be guilty of neglect of duty by pursuing an injudicious course, if it was pursued in obedience to the pilot's orders. So far as this issue is concerned, the misconduct or want of skill on the part of the pilot is relevant; but I think the counsel for the respondent hardly *denied that there was ample evi- [222
dence to justify the finding of this issue for the plaintiffs.

The second question the judge and his assessors answered in favor of the defendants,—that the ship, by misconduct on her part, contributed to the accident. On this issue the burthen of proof lay strongly on the defendants. I cannot but think that there was a misapprehension, on the part of those who tried the cause below, as to what would constitute contributory negligence; on this I will observe when I come to deal with the facts.

The third question, as it is stated by Lord Kingsdown, does not exactly arise here; but I think that the evidence is such as to raise this question. Supposing the first question to be decided in favor of the ship, and the second question also to be decided in favor of the ship as far as regards the conduct of the captain and crew, and all those for whose negligence the owner of the ship would be responsible to third persons, on the ground stated in *Quarman v. Burnett* (1), that they were persons whom “he had selected as his servants from the knowledge of, or belief in, their skill and care, and whom he could remove for misconduct, and who were bound to obey his orders,”—can the tug escape the consequences of its misconduct, on the ground that the pilot, whom the shipowner did not select, but was compelled by law to take, and for whose misconduct he would not have been liable to third persons, might, if he had exercised proper skill and care, have avoided the consequences of the tug's misconduct, and failed to do so? This is disposed of by the judge of the Admiralty in Ireland in a single line. He says, “The ship, as I take it, is affected by the pilot's conduct.” This is not a self-evident proposition.

The majority of the Court of Appeal in Ireland thought the judge of the Admiralty right, on the authority of *Smith v. St. Lawrence Tow Boat Company* (2) (which, however, seems to me a decision that it was not a breach of duty in the tug in that case, to pursue a course which the pilot in charge of the *Silver Cloud*, if he did not order, at least consented to),

(1) 6 M. & W., 509.

(2) Law Rep., 5 P. C., 308; 8 Eng. R., 236.

and the *Energy* ('), which does not seem in point. And to these I may add the case of *Thorogood v. Bryan* ('), in which 223] the Court of Common Pleas in *1849 (consisting of very able judges) decided that a passenger on a public conveyance (in that case an omnibus) was so far identical with his own conveyance, that he could not recover for an injury sustained by him from the negligence of a third person, if there was contributory negligence on the part of those conducting the conveyance on which he was a passenger. Maule, J., gives reasons, which are certainly not applicable to the case of a pilot whom the shipowner is compelled to take. He says, "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. The passenger is not without remedy. But as regards the present defendant, he is not altogether without fault. He chooses his own conveyance, and must take the consequences of any default of the driver, whom he thought fit to trust." This decision was very much questioned by the very learned editors of the fourth edition of Smith's *Leading Cases* (afterwards Mr. Justice Willes and Mr. Justice Keating (')). Their remarks on it and the subsequent cases ('), in which it has been discussed, are collected in the 7th edition of that work ('). But the decision itself has never been actually overruled. The precise question, whether the principle on which it proceeds, if sound, is applicable to the case of a pilot, has never, that I can find, been discussed, though in the *Energy* it seems to have been acted upon.

Lord Justice Fitzgibbon in the present case glances at what is my difficulty, along with a good many others, which perhaps had more weight with him, when he says ('), "I regret that this case is the first to lay down that the captain of a tug, who has contracted to bring a ship to harbor with reasonable care, may, against orders or without orders, wilfully drag her over a bank which he knows to be dangerous, 224] though he sees the pilot, whom *he is bound to obey, vehemently endeavoring to convey some signal to him, and indicating that the ship is going aground, and that the

(¹) Law Rep., 3 A. & E., 48.

(²) 8 C. B., 115; 18 L. J. (C.P.), 336.

(³) Vol. i, at p. 220.

(⁴) *Tuff v. Warman*, 5 C. B. (N.S.), 573; 26 L. J. (N.S.), C. P., 263; *Vose v.*

The Lancashire and Yorkshire Railway Co., 2 H. & N., 728; *Waite v. The North Eastern Railway Co.*, 11 L. & E., 719.

(⁵) At p. 300.

(⁶) Printed papers in the case, p. 145.

owner a ship so treated is to be deprived of all redress because the pilot (*whom it is not even in his power to select*) had not the foresight, or the presence of mind or the courage to cast his ship adrift, and at the approach of night, against a high wind with a rising tide, let her take her chance of avoiding alone the consequences of the admitted misconduct of the tug which was employed to conduct her safely home. I can only say that I entirely dissent from such a conclusion."

The counsel for the appellants did not rest their case on this point of law, and it was not argued at your Lordships' bar. It is one of general importance, and, if it were necessary to decide it either way, I should wish to hear a farther argument on that point. But before putting the parties to that expense, I think it right to inquire whether, even if the ship is, for this purpose, affected by the pilot's conduct (a proposition which I neither affirm nor deny), the owner of the tug did in this case satisfy the onus cast on him of showing that there was contributory negligence on the part of the ship. I have come to the conclusion that he did not. [His Lordship here gave a detailed statement of the evidence which led him to this conclusion.]

Now, on this evidence two questions arise. First, did the pilot make such signals that it was negligence and want of skill in the master of the tug not to understand, and at once obey? That the pilot meant to give him such signals is clear. And I should be strongly disposed to draw the conclusion that he did so, but it is, of course, possible that the pilot might have lost his head altogether, and made unintelligible signs, and those who heard the witnesses and saw the pantomime described on the notes as "witness made the signs with his hands," had better means of forming a judgment on this than I have. But I think this not material, for all are agreed that the master of the tug did at last obey and port his helm. Then the next question is, if he had continued to follow that course, would the Ruby have gone clear of the bank. She had got too near, dangerously near, to the bank, and I think it at least very doubtful if a vessel under canvas only could then clear the bank. But with the aid of a tug both to bring the ship's head *round [225 more quickly, and to assist in checking the weigh of the ship towards the bank, which was not to leeward, a vessel assisted by a tug might get clear of the bank after she could no longer do so under canvas alone. I should have liked to have more distinctly the naval assessors' opinion on this point, which is one of seamanship; but I cannot find that they were asked, and probably, from not knowing the (perhaps

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artificial) rules by which the law of contributory negligence is regulated, they did not think it of so much importance as I think it was. Was the course which the tug then for a short time took one which would, if pursued, have taken the vessel clear? Cavanagh, the master of the tug, himself says that it would. And I find no one who says to the contrary.

If this was so, and I think we must take it to be so, there would have been no accident if the tug had not starboarded her helm. Was that negligence? I think it was very gross negligence. He excuses it by saying that the Ruby not having followed him he thought he must have misunderstood the previous signals. Now I think the evidence is very strong that the Ruby did follow him; and if he thought she did not, it must have been because (in the most lenient construction of his conduct) he did not wait to see whether she was doing so or not. I quite agree with what Lord Kingsdown said in *The Julia* (*) as to the advantages which those who see the witnesses have in forming an opinion as to anything depending on a conflict of testimony, and on the propriety of not setting aside their decision without strong grounds. And I agree that this observation has still more force where the question is one of seamanship, and the court below has the assistance of nautical assessors. I am perfectly aware of what would be the probable fate of a ship which was trusted to my pilotage, and would therefore never think of acting on my own notion of what ought to be done, if I found that opposed to the opinion expressed by nautical assessors. But I do not think I have differed from them in holding that the starboarding of the helm by the tug was negligence, and was the cause of the accident. I also accept the finding that the pilot "was negligent, supine, and inactive," and that all the more readily, be-226] cause I have *myself come to the same conclusion. And I will not quarrel with their finding that the captain of the Ruby was to blame in quitting the deck, though I am by no means clear that I should have come to that conclusion myself. But no negligence which was over before the tug negligently starboarded her helm, could be contributory negligence in the sense which is required to relieve the tug from the consequences of that negligence. Be it that there was negligence in the ship and those for whom the ship was responsible in letting her get so dangerously near the bank before the helm was ported, as complete as the negligence of those who, in *Davies v. Mann* (*), left the fettered donkey dangerously rolling in the road, it forms no defence to an

(*) Lush., 231; 14 Moo. P. C., 210.

(*) 10 M. & W., 546.

action against the persons who, by want of proper care, have injured the ship. To make a defence on this ground it must be shown that the injured party, or those with whom for this purpose he is identified, might, by proper care, subsequently exerted, have avoided the consequences of the defendant's want of proper care. I do not think that in this case the pilot had presence of mind or skill, so as to know whether there was anything that could be done or not, but I am unable to see what a skilful person in charge could then have done. It is said he might have thrown off or cut the tow rope and wore ship under canvas, and the assessors say that he could have done so, and ought to have done so, on what they call the first occasion, when he was half a mile or so farther from the bank. But they do not say that there was still space enough to do so after the tug star-boarded, and I rather think, with Lord Justice Fitzgibbon, that, by implication, they, finding he was to blame for not doing so on the first occasion, express an opinion that he was not to blame for not doing so on the second; and the evidence of the second mate is clear, that it was too late, that the space was too short. I do not attach much weight to the evidence of Tallant, the pilot, but he says the same at the end of the passage I have already read.

It is then said that the *Ruby* might have tacked and so got out safe. No case of this sort was made on the evidence, the only question asked being of one witness, whether the ship could have then tacked, and he answered "No." But says the judge of the *Admiralty: "There was a sec- [227] ond occasion, and that was when the *Ruby* got closer and in more dangerous proximity to the bank. That was the second time the pilot was imperatively called upon to act. The assessors are of opinion that, with the assistance of the tug, the *Ruby* could have tacked and gone in a south-easterly direction, and so been in safety. It strikes me as odd that this question was not put to any of the witnesses but one, and that was to the second mate, and he says that she could not have tacked; if he meant that unaided she could not have tacked, then to this the assessors agree. But the witness was not asked whether she could with the tug's assistance have tacked. The assessors are of opinion that she could; that the pilot should have given orders for that purpose, and that he is culpable for not having done so. These are the two instances; but the assessors' opinion is that "from first to last he was negligent."

I should like to have asked the assessors whether, if the ship, being so near the bank as she was, had tried to tack

and failed, she would not have come on the bank broadside, and at least run the risk of a far more serious accident than actually occurred; and if they had answered, as I have little doubt they would, that it was so, I would then have asked them, if a person of competent skill—I do not mean this pilot, who they clearly thought had not competent skill—but if a person of competent skill, having charge of the Ruby at that time, knowing where the bank was, and knowing that the person in command of the tug was one to whom it was, to say the least, difficult to convey orders, and who was not very quick in obeying them, might not, without showing any want of skill, come to the conclusion that it was best to follow the tug and go over the bank, hoping that the ship would not have much injury from touching in going over the bank, rather than to try what was a somewhat delicate manœuvre, which, if it failed, was likely to cause a much worse accident?

No such question was asked, and I cannot tell how the assessors would have answered it. I think that unless that question was answered in the negative no case of contributory negligence was made out, even on the assumption that the ship was for this purpose identified with the pilot. The onus certainly lay strongly on the tug to make out this, and 228] I think, on the evidence, it is *not made out. I therefore come to the conclusion that, without expressing any opinion either one way or the other on the question of law, the judgment should be reversed.

LORD WATSON: Having carefully read the evidence, and also the opinion now delivered by my noble and learned friend, I feel no doubt whatever that the judgment of the court below was erroneous and ought to be reversed.

Order appealed from reversed, and cause remitted to the court below, with a declaration that the appellants are entitled to a decree for damages and costs, as prayed by the petition, together with the costs of the appeal below. Respondent to pay to appellants the costs of the appeal to this House.

Lords' Journals, 7th March, 1881.

Solicitors for appellant: *Pritchard & Sons.*

Solicitors for respondent: *Waltons, Bubb & Walton.*

See 32 Eng. Rep., 69 note.
As to construction of statute allowing pilot pay for services tendered to a

vessel, but refused, see *The Glavamasa*, 8 Sawyer, 22; *The Whistler*, Id., 232.

[6 Appeal Cases, 229.]

H.L. (E.), March 10, 11, 1881.

[HOUSE OF LORDS.]

***THOMAS CASTRO, otherwise ARTHUR ORTON, other- [229
wise SIR ROGER CHARLES DOUGHTY TICHBORNE, Bart.,
Appellant; and THE QUEEN, Respondent (').**

*Indictment—Two Counts—Misdemeanor—General Verdict—Second Term of
Imprisonment beginning at the end of the First.*

An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two different occasions, one in the progress of a trial, the other in an affidavit in Chancery. Both acts of perjury had the same object in view:

Held, 1. That they were distinct offences, and a punishment might be inflicted in respect of each.

2. That though the offences were in this way distinct, they might both be included in the same indictment, and that a general finding of guilty on the charges contained in both counts was good.

3. That the full punishment of seven years penal servitude might be inflicted for each offence, and that the second term of penal servitude was properly made to begin at the termination of the first term.

4. The 2 Geo. 2, c. 25, s. 2, authorizes the judge before whom a person shall be convicted of perjury, to order such person to be sent to a house of correction for seven years, there to be kept to hard labor; "and thereupon judgment shall be given that the person convicted shall be committed accordingly, over and beside such punishment as shall be adjudged to be inflicted upon such person, agreeable to the laws now in being."

Held, that this statute did not impose on the court the necessity of awarding any punishment previous to that of penal servitude, so as to give the sentence of penal servitude the form of an additional punishment.

The conclusion to a count "*contra formam statuti*" is now, by 14 & 15 Vict., c. 100, s. 24, no longer necessary.

THIS was an appeal against a decision of the Court of Appeal, which had affirmed a judgment of the Queen's Bench Division (').

On the 8th of April, 1872, the grand jury at the Central Criminal Court found a true bill against Thomas Castro, alias Arthur Orton, alias Sir R. C. D. Tichborne, Bart., for perjury. The indictment contained two counts. The first count charged that *on the 10th of May, 1871, at [230 Westminster, before Sir W. Bovill, Lord Chief Justice of the Common Pleas, an issue, duly joined in an action of ejectment, came on to be tried, in which the appellant was the claimant, and Franklin Lushington and others were defendants, that the appellant appeared as a witness for himself and was duly sworn, and gave answers in several

(') Affirming 29 Eng. R., 408; 9 Eng. R., 323.

(*) Law Rep., 9 Q. B., 350; 9 Eng. R., 323; 5 Q. B. D., 490; 29 Eng. R., 408.

matters (which were particularly set forth), and that the appellant on his oath falsely answered in these matters, and so committed the offence of perjury against the peace of our lady the Queen, her crown and dignity.

The second count charged that, on the 7th of April, 1868, a suit had been instituted in Chancery, in which the appellant was the plaintiff and the Hon. Teresa Tichborne, widow, and others were the defendants, praying that in case it might be deemed requisite for him to take proceedings at law, for the recovery of the Tichborne estates, the defendants might be restrained by injunction from setting up certain outstanding terms, &c., therein mentioned, and that on the said 7th of April, 1868, the defendant made an affidavit in support of his motion in the said suit, and therein made certain false statements (which were fully set forth in the count), and did thereby commit perjury against the peace, &c., as before.

The appellant pleaded Not guilty. The indictment was removed into the Queen's Bench. The trial, which began on the 23d of April, 1873, and terminated on the 28th of February, 1874, took place before Lord Chief Justice Cockburn. The verdict was in the following form: "The jurors so empanelled, &c., on their oath say that the said Thomas Castro, otherwise called, &c., is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified, in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." The judgment that followed was, "That the said Thomas Castro, otherwise, &c., for the offence charged in and by the first count of the said indictment, be kept in penal servitude for the term of seven years now next ensuing. And that for and in respect of the offence charged in and by the second count of the said indictment, he, the said Thomas Castro, otherwise, &c., be kept in penal servitude 231] for the farther term of seven *years, to commence immediately upon the expiration of his said term of penal servitude for his offence in the first count of the said indictment."

On the 13th of December, 1879, Sir John Holker, Her Majesty's then Attorney-General, granted his fiat for a writ of error, which was afterwards issued, and the case was argued in the Court of Appeal, when judgment was given for the Crown⁽¹⁾. This appeal was then brought.

Mr. Benjamin, Q.C., and Mr. Atherley Jones (Mr. Hedderwick and Mr. Spratt were with them), for the appellant,

(1) 5 Q. B. D., 490; 29 Eng. R., 408.

renewed the argument used in the court below, and, in addition to the cases there cited, mentioned and commented on *Reg. v. Roberts* (*), *Reg. v. Rhodes* (*), and *Rex v. Ellis* (*).

The *Attorney-General* (Sir H. James), the *Solicitor-General* (Sir Farrer Herschell), Mr. Poland, and Mr. A. L. Smith, appeared for the Crown, but were not called on.

THE LORD CHANCELLOR (Lord Selborne): My Lords, your Lordships have listened attentively to the arguments which have been offered with much ability and zeal at the bar of your Lordships' House in support of this appeal, but I believe your Lordships are all agreed that it is unnecessary to call upon the learned Attorney General to answer those arguments.

There have been suggested, as I reckoned them, six objections to the judgment in question; and I will shortly deal with those objections, not exactly in the order in which they were presented in the argument, but reserving until the last that which appeared to be chiefly relied upon by the leading counsel for the appellant. The first objection was, that there was no finding of guilty upon each of the counts; but that there was a general finding of guilty upon the charges contained in both counts. That was founded upon the language of the verdict, "that the said Thomas Castro," and so on, "is guilty of the premises on him above charged in and *by both counts of the indictment; [232 aforesaid, above specified in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." I think it unnecessary to say more upon that objection, than that it appears to me to impose a perverse and unreasonable interpretation upon the language of the verdict, which mentions both counts, in a sense, in my opinion, clearly applicable to each count.

The second objection was, that the indictment did not conclude with the words, "against the form of the statute," &c. Before the passing of the act 14 & 15 Vict., c. 100 (s. 24), it appears undoubtedly to have been law—highly technical, but still well-settled law—that, in order to justify the infliction of a statutory punishment for an offence which was also a common law offence, it was necessary to conclude with a reference to the statute or statutes. If that was not done, the indictment was taken to be simply an indictment at common law, and a common law punishment only could be inflicted. But for the purpose of obviating the inconvenient and unreasonable consequences of that and some

(*) Carth., 226; 1 Show., 389; Comb., (†) 2 Ld. Raym., 886.
193; 4 Mod., 100. (‡) 6 B. & Cr., 145.

other technical rules relating to the forms of pleading in criminal cases, the statute of 14 & 15 Vict., c. 100, was passed; which said, in sect. 24, that an indictment should be sufficient without these forms. It is argued that the only effect of this is to save such an indictment from being demurrable, or bad and liable to be quashed; but that it is not enough to enable a statutory penalty to be inflicted when the statute is not referred to. I am of opinion that to place any such narrow construction upon such words in a remedial statute, which was intended to get rid of unreasonable technicalities not necessary for any substantial purpose of justice, would be a great mistake on your Lordships' part. When the statute says that an indictment shall not be held insufficient for want of such a form, I understand that to mean that it shall not be held insufficient for any purpose for which it would have been sufficient if the form so dispensed with had been observed. That, my Lords, I think sufficiently disposes of the second objection.

That which I think it would be convenient to take as the third objection arises upon the language of the statute 2 Geo. 2, c. 25. It is said that this sentence is bad, because the punishment inflicted is not additional to some other [233] punishment which *might have been inflicted if the statute 2 Geo. 2, c. 25, had not been passed. My Lords, that objection has not reference to one count more than to another, but it would apply, if true, to the judgment on each count. But I think there is no foundation for it. It is based upon these words in the 2d section of the statute: "And the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, be it farther enacted by the authority aforesaid, that, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labor during all the said time, or otherwise to be transported" (I do not think we need pursue the alternative of transportation): "and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being."

My Lords, even if the punishment which the laws, in

force for the time being, permitted to be inflicted for perjury before that statute was passed, had been altogether *diversi generis* from that which would be suffered under this clause, I should greatly doubt whether it would be a reasonable construction of these words to hold that they require cumulative punishments, both under the common law or the statute of Elizabeth, and also under this act of Geo. 2, to be inflicted in all cases in which that act is put in force. I think it would be more reasonable to hold, that the Legislature intended to leave the judge such discretion as he had before with regard to any other penalties, either by common law or by statute, and only to enable him to increase the quantum of punishment, within the limits authorized by the statute, if he should think it proper to do so. But I do not think, according to the view which I take of the matter, that even that question need now be determined; because the substance of the provision is this: There was power, both at common law and under 5 Eliz., c. 9, to punish perjury by imprisonment; and what this statute *does [234] is to prolong, within certain limits, the term of imprisonment, and to enable the judge to superadd to imprisonment, hard labor, during that term, in the house of correction. When, therefore (as in this case), the convict is sentenced to imprisonment, and to something more (viz., penal servitude, now substituted for transportation), he undergoes the common law penalty, with an addition to it, authorized by this statute. That there should necessarily be two distinct and separate terms of imprisonment, does not appear to me to be required, either by the letter, or by the spirit, of the statute. The objection is, no doubt, one which a prisoner convicted and sentenced is perfectly at liberty to urge if he can make it good. It means, however, not that he has received too severe a punishment, but that he ought to have received more punishment still, and the interpretation which I propose to your Lordships to put upon the words of the statute is not adverse to persons sentenced for criminal offences of this kind, but is one of greater leniency and more in their favor.

The fourth objection, touched rather lightly by Mr. Benjamin, but somewhat more strenuously urged this morning upon your Lordships by the junior counsel for the appellant, was that there was really, in this case, only one offence charged by both counts. With all the ingenuity and zeal of both learned counsel, they failed to make me clearly comprehend how they intended to put that matter before your Lordships. It appears to me to be impossible on prin-

ciple (and no authority was cited for the proposition), to hold that perjury committed in a Chancery suit in 1868, and perjury committed at the trial of an action before the Lord Chief Justice of the Common Pleas in 1871, are one and the same offence; although the Chancery suit and the action at common law had a common object, that object being to substantiate a claim to certain estates. I should be of the same opinion even if all the assignments of perjury on each occasion had been exactly the same; they would still have been two distinct perjuries, committed at two distinct times, in two distinct legal proceedings. But in point of fact you find, in addition to some similar assignments of perjury upon each occasion, others upon the second occasion, different from those upon the first. No more need be said about that objection.

235] *Next, it has been zealously argued by the junior counsel for the appellant, that, however many counts there might be, whether charging distinct offences or not, only one judgment could properly pass upon one indictment for misdemeanor. Not only was no authority cited for that proposition, but the authority which was, for a different purpose, relied upon by Mr. Benjamin—the case in this House of *O'Connell v. The Queen* (*)—clearly establishes the contrary. I do not think it necessary to do more than read two or three passages from the opinions delivered in that case. Lord Wensleydale, then Baron Parke, in his opinion (†) says this, “If this point were to be considered independently of the understood rule upon this subject, and supposing that no such rule existed, I should say, that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions, only in different words, of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as Mr. Justice Buller states in *Young v. Rex* (‡); though the late Mr. Justice Taunton intimated a different opinion (I think without sufficient ground) in *Rex v. Powell* (§). The question then being how these counts are to be dealt with on the face of the record, I should have said, *a priori*, that it was the duty of the court acting between the Crown and the accused, and the right of the ac-

(*) 11 Cl. & F., 155.

(†) 11 Cl. & F., at p. 295.

(‡) 3 T. R., 98, at p. 106.

(§) 2 B. & Ad., 75, at p. 78.

cused, to have the charge of each offence (for as such I must treat it) properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted and for what not."

Lord Denman said ('): "With regard to several counts in criminal cases, the objection may be entirely avoided by the court passing a separate judgment upon each count, and saying, 'we adjudge that upon this count on which the prisoner is found guilty, he ought to suffer so much; that upon the second count he ought, *on being found guilty, [236 to receive such a punishment; whether the count turns out to be good or not, we shall now pronounce no opinion.'" Lord Campbell added ('): "It is an utter mistake to suppose that there is only one *corpus delicti* which is made the subject of several counts in one indictment. Even with respect to felony, the law supposes a separate offence to be charged in each count; and in misdemeanors there are not unfrequently in the different counts entirely different offences, of different sorts, committed at different times." And my Lords, I may add, that the decision of this House in that case was, that if there were not a separate judgment on each count, then, if there were any one count bad at law, the judgment, being incapable of being referred to the good counts alone, must be regarded as distributed among them all, and the whole proceeding would fail. I heard this point argued, by Mr. Atherley Jones, with some degree of surprise, because I certainly understood his learned leader, Mr. Benjamin, to have more than once given it up in the course of his argument.

That brings me to the remaining point: that a cumulative sentence of imprisonment for two periods of seven years, one on each count, and each for a distinct offence, could not properly be given; because the maximum length of imprisonment, under the act of Geo. 2, for any offence of this kind, is seven years; and two periods of seven years together make fourteen.

This objection would be perfectly good if the law did not permit a sentence, upon the second count for the second offence, to be so pronounced as to take effect, by way of commencement, after the end of the term of imprisonment to which the prisoner was sentenced upon the first count. But it was decided in this House, in the case of *Rex v. Wilkes* ('), as long ago as 1769, that when there is a subsisting sentence of imprisonment (in that case it was under a distinct indict-

(') 11 Cl. & F., at p. 377.

(') 11 Cl. & F., at p., 415.

(') 4 Burr., 2527, 2577; 4 Bro. P. C., 360, 367; 19 How. St. Tr., 1075, 1136.

ment, both indictments coming simultaneously for judgment before the court), the proper course is to pronounce, (if imprisonment be the penalty,) a second sentence of imprisonment, to commence at the expiration of the first. I will shortly refer to the reasons for that conclusion, as they were stated by the Chief Justice, Sir Eardley Wilmot, in 237] *delivering the unanimous opinion of the judges, upon the questions submitted to them by this House. The third question was, "Whether a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law?" The learned judges returned an affirmative answer in the terms of the question; and thereupon this House affirmed the judgment, which had been in fact so pronounced. That was a case of misdemeanor; and the material passages, which I think it worth while to refer to in Chief Justice Wilmot's opinion, occur in the report in Howell's State Trials ('): "In treasons and felonies" (said that learned judge), there is "a certain known judgment which cannot be departed from, viz., in the present tense of the subjunctive passive; but in misdemeanors, where punishment is discretionary, the limitation as to time seems only to be, that the punishment shall take place before a total dismission of the party: a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment *in futuro*. But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it." He added, that, if the punishment had been inflicted by imprisonment for twelve months, then, as the prisoner was already sentenced to ten months, it would have been only an imprisonment for two; in other words, that the power which the court thought fit, having discretion to exercise, of awarding a period of twelve months' imprisonment for the second offence, could not have been exercised, otherwise than by postponing it till after the expiration of the first.

I pause to observe, that, in a case like the present, where the statutory power is to imprison for a term not exceeding seven years, if two simultaneous sentences were passed, both for the maximum period, and both commencing at the same time, it would be manifest that for the second offence there would be no punishment at all. "We cannot" (said

(') Vol. xix, at pp. 1133, 1134.

the Chief Justice), "explore any mode of sentencing a man to imprisonment who is *imprisoned already, but by [238 tacking one imprisonment to the other, as is done in the present case."

So far, therefore, my Lords, as relates to misdemeanors, and, subject to the question whether this authority would apply when the aggregate of the two punishments exceeds, in point of time, that which there would have been power to award for either offence alone, subject to that distinction, the case of *Rex v. Wilkes* (') in this House is clear and distinct authority in favor of the proposition, that, when a man is found guilty of two misdemeanors, being distinct and separate offences, (I apprehend it makes no kind of difference whether it be by two indictments simultaneously tried and found against him, or upon two counts in one and the same indictment,) there not only a competent but the proper course was, and is, to pronounce a second sentence of imprisonment (assuming it to be within the power of the court as to duration), to commence and begin after the expiration of the first.

If that be so, I ask what difference can it make, that a statute has said, that for a single offence, instead of having a discretionary power to imprison for any term that may be thought fit, the court shall have power to imprison for a term not exceeding seven years? The only difference it makes is this: that, for each offence, the court can go as far as seven years, and cannot go farther; but the moment it is ascertained that it is proper for the court to pronounce a second sentence for a distinct offence, commencing after the expiration of the imprisonment to be suffered for the first, then the sentence so commencing, being for seven years only, is within the statutory limit. The moment you understand the point decided in the case of *Rex v. Wilkes* ('), it is seen to be a fallacy to mix up the two together, as if there had been only one offence, and to say, that, because only one term of seven years' imprisonment can be inflicted for a single offence, therefore only seven years in the aggregate can be inflicted for two offences. The statute has not said so; and to say so would be to deprive the court of the power of postponing the commencement of the second sentence. If the argument were good for anything it would be good to cut off, not only the whole, *but every frac- [239 tion of the seven years. The first sentence being for the full period of seven years, the result would be that it would

(') 4 Burr., 2527, 2577; 4 Bro. P. C., 360, 367; 19 How. St. Tr., 1075, 1186.

be impossible, according to that argument, to pronounce any sentence at all of imprisonment for the second offence.

The subsequent action of the Legislature shows how completely the law, laid down in *Wilkes' Case* (¹), has been since recognized, and extended. By the act 7 & 8 Geo. 4, c. 28, the same rule was extended to cases of felony; there being added, *ex cautela*, to the end of the 10th section of that act (which expressly said that when a person was "already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced,") these words, "although the aggregate term of imprisonment may exceed the term for which the punishment could be otherwise awarded." I have left out the alternative of transportation, for shortness' sake. I apprehend, my Lords, that, if those last words had not been there, the effect would have been practically the same.

After the passing of that statute occurred the case of *Rex v. Robinson* (²), in which thirteen learned judges were of opinion that, there being two distinct misdemeanors charged in the same indictment in different counts, and one sentence for two years imprisonment passed, the judgment was bad; because, by statute, one year was the maximum term which the court had the power to inflict for such an offence. But all the thirteen judges are stated to have been agreed, that the sentence would have been right if there had been two consecutive sentences of one year's imprisonment each.

After that, another act of Parliament (11 & 12 Vict. c. 43) was passed giving justices, in the exercise of summary jurisdiction in criminal cases, a similar power to that which had been given to the courts by the act of the 7 & 8 Geo. 4. It is said (s. 25) that, where justices upon information should adjudge a defendant to be imprisoned, and the defendant should "be then in prison undergoing imprisonment upon 240] a conviction for any other offence, the *warrant of commitment for the subsequent offence shall, in every such case, be forthwith delivered to the gaoler to whom the same shall be directed;" and it should be lawful for the justices issuing it, if they thought fit, to award imprisonment for such subsequent offence, which should commence at the expiration of the imprisonment to which such defendant should have been previously adjudged or sentenced. The Legislature did not add, in that statute, the words, "although the ag-

(¹) 4 Burr., 2527, 2577; 4 Bro. P. C., 360, 367; 19 How. St. Tr., 1075, 1136.

(²) 1 Mood. C. C., 413.

gregate term of imprisonment should exceed the term for which the punishment might otherwise be awarded."

A question under that statute came before the Court of Queen's Bench, in the case of *Reg. v. Cutbush* ⁽¹⁾; and the only difficulty that was felt there by the learned judges (if any difficulty was seriously felt) was this: that the language of the earlier statute was, "wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime," and the words of the later statute were, "such defendant shall be then in prison undergoing imprisonment." The argument was, that if the man had not actually got into prison, although a sentence of imprisonment had been pronounced upon him, the clause did not apply. Lord Chief Justice Cockburn stated, after communicating with the other judges, that the practice of the judges, as far as living judicial memory went, under the earlier act (7 & 8 Geo. 4), whenever more cases than one of felony were established against a man, and he was convicted of them at one and the same time, had been to make the sentence of imprisonment for a second offence commence at the expiration of the sentence previously awarded for the first, although the convict had not actually been in prison. The learned Chief Justice, although admitting that there was some technical difficulty, not in any other part of the act, but in those particular words which I have read, yet thought the reason and substance of the case, in addition to the authority derived from the exposition of the earlier statute by uniform practice, sufficient to justify the conclusion that cumulative sentences might be awarded under those statutes, although the man had not already found his way into prison; and when, in point of fact, one sentence was passed practically at the same time as the other.

*The practice, therefore, as far as can be ascertained [241 from any of the authorities or from any of the books, has been uniform in favor of consecutive cumulative sentences of this kind; and this practice has been approved and extended by the Legislature.

I believe I have now dealt with every point which it is material for your Lordships to consider in this case; because, with regard to the decision in the State of New York, in the case of *Tweed v. Lipscombe* ⁽²⁾ it is sufficient to say that it proceeded upon New York law, and not upon English law ⁽³⁾. The cardinal proposition upon which it

⁽¹⁾ Law Rep., 2 Q. B., 379.

⁽²⁾ 60 N. Y., 559.

⁽³⁾ The report shows, and the head-

note states, that "the English law and cases" were "distinguished."

depends is one, which, if the view I have submitted to your Lordships is correct, the law of England rejects, namely, that only one sentence can be pronounced upon a single indictment.

For these reasons, and bearing in mind that both the courts, before which this question has already come, have unanimously agreed in their determination that there is no error in this record, I must now move your Lordships to affirm the judgment of those courts, and to dismiss the appeal.

LORD BLACKBURN: My Lords, notwithstanding the very considerable time which has been occupied in the argument, I have never been able from the beginning to the end to entertain the least doubt that in this case the judgment ought to be affirmed.

The first point which has been made on behalf of the plaintiff in error I think requires only to be stated to answer itself. It has been endeavored to be said that when there was in the Court of Chancery a proceeding pending to set aside some outstanding term in order to permit a trial at law in an action of ejectment, and in the course of that the defendant, who is now the prisoner, being sworn, committed wilful and corrupt perjury for the purpose of misleading the Court of Chancery in that suit, that was not a different offence from the offence he committed afterwards at the trial of ejectment in swearing falsely and committing wilful perjury with the intent to mislead the court that was trying the question of ejectment; or rather that the two offences 242] were substantially *the same. It is said that they were substantially the same offence, because both perjuries were committed in suits in which the ultimate object was to recover certain estates situated, I believe, in Hampshire and Dorsetshire.

Taking that to be the point, and stating it in that way, it does seem to me, upon the face of it, to be difficult to state anything which would make it more obviously wrong than the mere statement of the case does. We have nothing whatever to do with the ultimate object of the perjury. The crime of perjury was complete as soon as the man wilfully and falsely swore a matter with the intention to mislead the Court of Chancery. The crime of perjury was complete when at a subsequent time the same man wilfully and intentionally made a false statement on oath, with intent to mislead the Court of Common Pleas. No doubt his object in each case was to recover the same estates. In like manner, in the case which was put by way of illustra-

tion, the object of a man who breaks open a house in the country with the intention to steal a jewel case, and finding that the lady has carried it off to London goes off to London and breaks into a house in London and gets the jewel case, his object in each case is to get the jewels, but no one will dispute that the two housebreakings are two crimes. It would have been quite possible, if the Legislature had been so wildly absurd, to have worded the act of Geo. 2 in such a way as to say that, when a man has with one object committed perjury, and commits afterwards any number of other perjuries for the same object, the aggregate punishment shall never under any circumstances exceed the seven years—as if all had been but one perjury. Such a thing if properly said by the Legislature and sufficiently expressed, would of course be valid; but it is not pretended that there is a word in the statute of Geo. 2, which can, by any torturing in argument, afford a basis for that proposition.

The next point I think, namely, that the words "*contra formam statuti*" were not inserted here, rests upon one of those technical rules which have been most properly abolished by the act of the 14 & 15 Vict., and I think I need say no more upon that than that that act clearly said, in effect, that where any indictment would have required "*contra formam statuti*" before that act was *passed, it [243 shall hereafter be just as good and sufficient for all purposes, though without those words, as if it had contained them.

The next point, my Lords, is this: It is attempted to be said that the statute of Geo. 2 requires that before the court can pass a sentence of penal servitude, it shall first pass a sentence such as might have been passed before that act. I can only say that I cannot construe the words as meaning that. The words of the statute seem to me to express very plainly that the court may give this punishment, and then the act proceeds to give the form of judgment and says that the prisoner may be sentenced to transportation (for which penal servitude is now substituted), and that may be done in addition to any punishment which shall be awarded by the existing law. That means, I think, in addition to any punishment which is given, if there be any other punishment given. It does not mean that such a punishment shall necessarily be given in order to be a foundation for the other. If it did so, the only effect would be that the sentence before the House should be amended by adding a fine of one shilling or an hour's imprisonment, or anything else the House might please. But I think it is quite un-

necessary to do that, for I feel clear (agreeing there with the court below) that the construction of the act is not that which is contended for by the plaintiff in error.

Then, my Lords, we come to what is more nearly approaching to something of substance, if it is really well founded. I must say at once I totally disagree with what has been repeatedly asserted by both the learned counsel at the bar. I totally disagree that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking of course of the time before the Judicature Acts passed which swept them all away. Many enactments had from time to time been passed, relieving the strictness of pleadings in civil cases, which did not relieve them in criminal cases; but the rules of pleading at common law were exactly the same in each case. The course taken with regard to an indictment was this: The Queen having sent her commission to the grand jury, or any other commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man 244] had committed *ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that, process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

Now, at common law there was no objection whatever, in point of law, to bringing a man who was charged with several offences, if those charges were all felonies, or were all misdemeanors, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and in misdemeanor, and therefore felony and misdemeanor could not be tried together; but any number of felonies and any number of misdemeanors might. The contrary was asserted by the learned counsel, but though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of sev-

eral things, was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made to the discretion of the presiding judge to say, "Try me only for one offence, or, try me only for two offences; if one was the real thing let me be tried for one and one only," and whenever it was right that that should be done the judge would permit it. For these mixed motives it was well established by a long series of decisions, (I confess I doubt whether they were right at first, but certainly they have been both well established now and sanctioned by statute—that is quite clear,) that where the several charges were of the nature of felony, the joining of two felonies in one count was so, necessarily I may say, unfair to the prisoner that the judge ought, upon an application being made to him, to put the prosecutor to his election and send them *to two trials. It never was de- [245
cided, even in felony, that, if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time, in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanor it was by no means a matter of course that that should be done. I think that, if the judge, upon an application made to him, had been satisfied that to try the man for several misdemeanors together would work injustice to the prisoner, he had a perfect right to say, "I will not work this injustice by trying them together, let us diminish them in number and try a reasonable number and no more." I do not know whether that was ever done in a case of misdemeanor, but I feel very little doubt that it may have been.

I think that in such a case as the American case⁽¹⁾ which was cited, where a man was called upon to answer before one jury at one time for 200 offences, the man might not unreasonably have said, "That is too much to put a man upon his trial for, select five or six, try me on those, let the rest stand over." I do not see that that would be at all an unreasonable application. And in the present case, if an application had been made to the Court of Queen's Bench

⁽¹⁾ *Tweed v. Lipcombe*, 60 New York, 559.

to put the party to his election, and if it had been said "I cannot be fairly tried for one offence of perjury committed in Middlesex, if at the same time I am to be tried for another perjury committed in London, therefore there must be two separate trials;" if such an application had been made the judges of the Queen's Bench would doubtless have said, "We will listen to the arguments that may be urged in its favor. What they could possibly have been I do not know, but no such application was made. The prisoner was tried upon the two counts before one petty jury. They were taken both together, and then the result was that he was found guilty upon both."

Something was attempted to be argued upon the wording 246] here, *namely, that he was found "guilty of the premises" in both counts, to the effect that that did not mean the premises charged in each of the counts, but meant only (if I understand the argument rightly) such premises as were charged not only in the one but also in the other. In the first place, that is not the meaning of the words; and, secondly, it would be utterly absurd because the one count related to things which happened in Middlesex, and the other related entirely to things which happened in London three years before, therefore there could be nothing identical in the two.

But he was found guilty, and then came the question what was to be the sentence. It is clear that if the court had pleased to grant an application these two counts might have been tried, the one in London before a London jury and the other in Middlesex before a Middlesex jury; but for the act relating to the Central Criminal Court, which gives that court jurisdiction over both London and Middlesex, they must have been so tried. But even now they might have been so tried, and if they had been so tried, and if each jury had found a verdict of guilty on the counts brought before it separately, *Rex v. Wilkes* (') would have been absolutely in point as to the sentence. There would not have been a pretext for saying there was the least difference.

But then it is put in the argument in this way, that when they are both tried before one jury, and when the prosecutor has not been put to his election, but the trial for both offences has taken place together, the consequence must be that the prisoner is not to be punished in the same way as he would have been if he had been tried for each before two separate judges, and he is therefore entitled to get off with less pun-

(') 4 Burr., 2527; 19 How. St. Tr., 1075; 4 Bro. P. C., 360.

ishment. Why? I am sure I cannot conceive, nor can I see that any authority has been cited for that, at any rate in the English law, nor does it proceed on any reason. In regard to the American case⁽¹⁾ which was cited, it might be enough to say that I observe that the American case proceeds upon the express ground that the court was acting upon New York decisions, subsequent to the Declaration of Independence, *and upon New York statutes, [247 and not upon English rules or English law. I dare say that decision may be right according to those New York decisions and statutes, but the decision does not apply here. They say that according to their view of the New York statutes and the New York decisions, where there is but one trial before one jury, it must be for one offence, and for one offence only, and upon that they all rest. They logically enough say, if that is granted, where there are sentences passed for more than one offence, all but one must be *ultra vires*; accordingly they held that the power of passing a sentence was exhausted by the first sentence. I leave it to the American judges to say whether that was right or not according to American law. I do not pretend to express an opinion on that, but I am quite clear that it is not English law. I think the English decisions are all the other way, and the reason of the case is, to my mind, quite clearly the other way.

Now I will mention but one or two cases which prove it. I will not quote them at length. The first is *Young v. The King* ⁽²⁾, where the law is laid down in the way I have stated, that it is not a matter of right and law that they shall not be tried together, but only a matter of election. Then comes *Rex v. Jones* ⁽³⁾, where Lord Ellenborough both laid down the law as I have stated it, and acted upon it. Then *Rex v. Kingston* ⁽⁴⁾, where Lord Ellenborough again repeats the doctrine; and lastly *Rex v. Robinson* ⁽⁵⁾, which has been already cited, where it was said that the doctrine of *Rex v. Wilkes* ⁽⁶⁾ ought to have been applied to a case where there were two misdemeanors in separate counts tried together before one jury. My Lords, taking all those cases together, I myself can feel no doubt at all, that, by the English law, and going by that alone, there is not a pretence for this writ of error.

⁽¹⁾ *The People ex rel. Tweed v. Lipcombe*, 60 New York, 559.

⁽²⁾ 3 T. R., 98.

⁽³⁾ 2 Camp., 131.

⁽⁴⁾ 8 East, 41.

⁽⁵⁾ 1 Moo. C. C., 413.

⁽⁶⁾ 4 Burr., 2527; 19 How. St. Tr., 1076; 4 Bro. P. C., 360

LORD WATSON: My Lords, after hearing the very ingenious arguments on the part of the appellant, I have come 248] to the same conclusion as *your Lordships that there has been no reason whatever shown for reversing the judgment now under the review of the House. The view I take of the various objections which have been urged against the validity of this verdict, and sentence, has been so well expressed already that I do not feel justified in adding more than a few words to what has already fallen from your Lordships.

The question as to what constitutes a separate offence where there has been a repetition of acts of the same character may at times involve questions of extreme nicety. It is unnecessary to deal with any of the cases such as have been suggested in the course of argument, as to whether statements differing in their character, made by a person under oath upon the same occasion, will constitute separate acts of perjury when falsely made. It is quite unnecessary to consider that in the present case. I have no hesitation in holding that where at two different times, at different places, in different suits, and under the sanction of two different oaths, the same man repeats the same false statement, he thereby commits two separate acts of perjury, two different crimes; and I do not think it possible to bind these up together as one transaction, as was suggested in the able argument of the senior counsel for the appellant. You cannot make them *partes ejusdem negotii*, when so separated in time and place and circumstance, by the mere fact that the person who committed perjury on each of those occasions was actuated in both by the same motive and had the same improper object in view.

My Lords, I think the criticism upon the terms of the sentence is quite unfounded, and that it must be taken that these words import, as according to their natural signification they do, in my opinion, import, that the jury thereby found the accused guilty of each of the separate charges of perjury in this indictment preferred against him.

I shall not refer to the argument founded on the absence of the words "*contra formam statuti*," or to that founded on the statute of Geo. 2, or the argument which we have heard from the learned junior counsel to-day, because those have been entirely disposed of by the observations which have already fallen from your Lordships.

The last, and what appeared upon the argument of Mr. 249] Benjamin *to be the most important consideration which the counsel for the appellant had to urge upon his

behalf, was, that where, upon one indictment, there are two separate charges *ejusdem generis*, and the prisoner is convicted of both, if there be a statutory limit to the punishment which may be inflicted for one of those offences, that is to be the measure of all the punishment that can be inflicted upon him for more than one offence.

Now, my Lords, so far as I could follow the argument, there is an important rule of qualification which must be observed, and that is, if for each offence the statute says you shall inflict a sentence of not more than seven years of penal servitude you cannot for the two offences so frame the sentence as to exceed that limit. For that proposition, which seems at first sight a very startling one, and does not in my view lose that character upon a closer inspection, no authority whatever was cited.

At length, at the close of his argument, an appeal was made by the learned counsel to an American case, not, of course, as to an authority, because I take it that a judgment of a court in New York is not an authority in a case arising in England, with regard to English rules of procedure, but as a decision of learned judges that ought to influence the House to come to the same conclusion in the present case as that which the American court arrived at in the case of *Tweed v. Lipscombe* (¹). But that case, even if it were receivable as an authority, does not appear to me to be in the least degree an authority for the proposition in support of which it was quoted. What was decided there was that the law of America differs from the law of England, and one of the judges expressly puts it that because of that difference the English decisions were of no authority in America; and I should have thought that the converse of that proposition would be equally true, namely, that the decisions in America, there being a difference between the laws of the two countries, would be of no authority here.

But assuming the case of *Tweed v. Lipscombe* (¹) to be an authority, what does it come to? It comes to this, that in prosecutions for misdemeanor in America you can only proceed for one offence upon each indictment; and if you desire to have cumulative *punishment, extending to [250 more than one statutory punishment, you must bring more than one separate indictment. The inference which I draw from the words used by the two learned judges who decided that case is this, that you might have more than one penalty, of the full amount, tacked together, if you bring separate proceedings for that purpose. But then, my Lords, in England

(¹) 80 New York, 559.

it is not necessary to bring these two separate proceedings in order to try one criminal for a misdemeanor, and I see no reason whatever, even if I accept that decision as law, for holding that if you can tack together two periods of the full amount, one for each offence, when you try by separate indictments, the same may not be done when two offences are tried under the same indictment. And still farther, it humbly appears to me that amongst the cases cited at the bar there is to be found not only authority, but ample authority, for the proposition that such a sentence is sustainable and is good according to the law of England.

My Lords, had there been any serious doubt or difficulty attending these questions of criminal law which have been raised at your Lordships' bar, I should have given my opinion with very great hesitation and diffidence, but, looking to the very unsubstantial character of the objections which have been stated to this conviction and sentence, I cannot say that I feel the least hesitation in expressing my concurrence with the views which have been expressed by your Lordships.

Judgment appealed from affirmed, and appeal dismissed.

Lords' Journals, 11th March, 1881.

Solicitor for appellant: *Edmund Kimber.*

Solicitor for respondent: *Solicitor to the Treasury.*

See 29 Eng. Rep., 432 note; 30 id., 512 note; *People v. Sherwin*, 1 N. Y. Cr. Rep., 543.

A general verdict that the defendant "is guilty in manner and form as he stands charged in the indictment" where the indictment contains two counts, charging distinct misdemeanors, will authorize a sentence on each count: *Eldridge v. State*, 37 Ohio St. R., 191, disapproving *People v. Liscomb*, 60 N. Y., 559.

Where several sentences of imprisonment are passed on the same day, founded upon successive convictions, they should be cumulative: *Ex parte Bryan*, 76 Mo., 253.

On an information containing two counts, each charging a distinct misdemeanor, sentence may be passed on each count, the one cumulative on the other: *Regina v. Jones*, 1 Wyatt & Webb (Victorian) Law, 221.

An entry in these words upon a ver-

dict of conviction or plea of guilty, "In this case, it is considered by the court that the defendant should pay a fine of ten dollars and the costs of the case, but suspends judgment until the next term of the court," is a judgment, and the court cannot change that judgment at the next term by the addition of imprisonment: *Whitney v. State*, 6 Lea (Tenn.), 247.

Though, if there be no judgment, the court has power to render one at a subsequent term: *Greenfield v. State*, 7 Baxt. (Tenn.), 249.

A prisoner was convicted of larceny and sentenced to one year's imprisonment in Dorchester penitentiary. The warden refused to receive him, on the ground that the shortest period for which prisoners could be sentenced to or received at the penitentiary was two years. Prisoner was taken to the county jail. On a motion for *habeas corpus*, the jailer, in his return, set out

the conviction for larceny, and also returned that the prisoner was detained under a warrant of a justice for attempting to escape by tearing up the floor of his cell. The warrant annexed to the return was under the hand of two justices. The court refused to discharge him, and decided that he should be sentenced to imprisonment in the common jail for one year, inclusive of the period for which he had already been detained: *Matter of Rice*, 2 Nova Scotia L. R., 77.

Where, after suing out a writ of error, the convicted prisoner escapes, it

is within the discretion of the court whether it will proceed to the hearing of the cause while the escaped prisoner is at large.

The better practice is not to hear the cause unless the prisoner is in custody or on bail. Though in the particular case the court dismissed the writ, unless the prisoner surrendered into custody by the first day of the next term: *McGowan v. State*, 104 Ills., 100.

To same effect: *State v. Connors*, 20 W. Va., 1, and cases cited; *State v. Sites*, Id., 13.

[6 Appeal Cases, 251.]

H.L. (Sc.), March 7, 1881.

[HOUSE OF LORDS.]

*MACKAY, *Appellant*; DICK and another, *Respondents*. [251]

Contract—Condition Precedent—Implement of Condition prevented—Remedy.

If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.

By a written contract A. agreed to buy of B. a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "C." cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine:

Held, affirming the decision of the court below, that B. was entitled to a decree against A. for payment of the price of the machine.

APPEAL from a judgment of the First Division of the Court of Session, Scotland, pronounced in an action raised in the Sheriff's Court of Lanarkshire.

Previous to September, 1876, the appellant, Mr. John Mackay, *railway contractor, Wishaw, had entered [252] into a large contract for the construction of a branch line near Wishaw for the Caledonian Railway Company. This contract required the excavation of an extensive cutting, called the Wishaw Cutting, one end of which was known as the Carfin Cutting, and the other as the Garriiongill Cutting.

The respondents, Messrs. Dick & Stevenson, engineers, had about the same time invented a steam excavator or navy, which was capable of saving a good deal of manual

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labor. The parties entered into negotiations, and the question was whether the appellant was bound in law to take delivery of one of these steam excavators and to pay the price, £1,115, conformable to a written contract.

The contract between the parties is contained in the following letters :

To John Mackay, Esq.

Sept. 21, 1876.

Dear Sir,—We beg to confirm the arrangement made between you and Mr. Stevenson yesterday in regard to supplying a patent steam excavating machine for your cutting at Carfin, which is as follows: Machine to be as per accompanying specification, and capable of digging and filling into wagons at least 850 cub. yds. of the clay or other soft substances in said cutting—you supplying wagons as fast as they can be filled; and should it fall short of digging and filling this quantity after it is fairly tried on a properly opened-up face, you are not to be bound to keep the machine, but may return it at any time within two months. We, to uphold the machine for twelve months after its delivery, inasmuch as we will repair or replace, free of cost to you, all parts that may prove defective during that time, excepting the steam boilers and lifting ropes. The machine to be delivered, erected, and tested in the cutting before February next. Price to be £1,115, one-half payable when machine is delivered, one-quarter in three months thereafter, and remainder within six months; or, if you prefer, the whole to be paid when the machine has been tested and proves capable of digging the work specified.

DICK & STEVENSON.

To Messrs. Dick & Stevenson.

22 Sept. 1876.

Dear Sirs,—I have your favor of 21st instant, stating the terms upon which you will supply the above machine, and inclosing a general specification of same. The terms, which I now beg to corroborate, are :

1st. That the machine will be capable of excavating and filling 850 cub. yds. into wagons in a day of ten hours, and that of the material in the Carfin cutting, which is now open for your inspection.

2d. That the machine will be erected and tested in the said Carfin cutting before the month of February next.

3d. That the machine will be so constructed as to fulfil all the requirements 253] *necessary to admit of its travelling along any main line on its own wheels, along with, and as part of, any luggage train.

4th. That if the machine does not fulfil the terms of these stipulations, you shall remove the same at your own expense before the end of February next.

5th. That if I accept the machine after seeing its capabilities, you will maintain the same in all its parts, with the exception of the boilers and lifting ropes, for a period of twelve calendar months from the date of its commencing regular work.

6th. That I shall pay you for the said machine the sum of £1,115 (eleven hundred and fifteen pounds sterling).

7th. That all the expenses connected with the bringing, erection, and trial of the machine are to be borne by you.

On these terms you may at once proceed with the construction of the machine.
—Yours, &c.

JOHN MACKAY.

John Mackay.

26 Sept. 1876.

Dear Sir,—We were duly favored with yours of 22d inst. and agreeable to same are now proceeding with construction of the digging machine for Carfin cutting. . . . In erecting the machine for trial, it is to be understood that you are to lay and arrange the rails for the proper application of the machine, and also to supply wagons as fast as it can fill them. We neglected to say formerly that we will require the use of one of your jib cranes for a week or so in erecting the machine. The fifth clause of your letter would be more explicit were it

put thus : "5th, That I will accept of the machine if it performs the stipulated work; and if so, you will maintain, &c., &c." No doubt this is what you intend, and on that understanding we have much pleasure in proceeding with the construction.—Yours, &c. DICK & STEVENSON.

The material portions of the condescendence for the respondents (pursuers), and the answers thereto for the appellant (defender), are as follows :

(Cond. 5.) The cutting at Carfin was not in a condition to admit of the machine being erected and tested in it by or during the month of February, 1877, nor for a long time afterwards. Subsequently to that month the defender (appellant) agreed with the pursuers (respondents) to have it erected and experimented with in a cutting of the defender's at Garriongill, pending the necessary preparation for the application of the machine at the Carfin cutting.

The machine was erected there. Denied that the cutting at Carfin was ready for the trial of the machine in February, 1877, as stated by the defender. The cutting at Carfin was in the same state in February, 1877, as it was in July, the date at which the defender says no further work could be done. Further explained that the defender failed to have the cutting ready in February, 1877, and in consequence additional time was given pursuers to complete the machine. The machine was in many respects of an entirely unprecedented construction and arrangement, and both parties were alike anxious to take advantage of the experiments offered by the defender at Garriongill, particularly with a view of testing the strength of its parts.

(Ans. 5.) The cutting at Carfin was ready for the trial of the machine in *February, 1877, at which date the [254] pursuers were bound to have the machine ready for trial.

They failed to have the machine ready until July, 1877, at which date, owing to the state of the defender's works, it was impossible to do more cutting at Carfin until a viaduct across the Calder should be completed. The parties accordingly agreed that the machine, instead of being tested at the Carfin cutting, should be tried at the Garriongill cutting.

(Cond. 6.) The conditions under which the machine had been worked at Garriongill did not admit of its capability to excavate and fill the stipulated quantity of material being tested. The material, whilst generally of a similar kind to those seen at Carfin, had a hard rib or layer of stony substance running through the cutting, which was not seen when it was proposed to send the machine to Garriongill, and the machine was made to tear through this rib. . . .

(Ans. 6.) Denied—The conditions of trial were more favor-

able to the machine at Garriongill than at Carfin. . . . The machine, however, while at Garriongill was constantly breaking down, and was proved to be entirely inadequate to its stipulated rate of work. It arrived at the cutting about the end of July, 1877, and between that date and the 26th of March, 1878, several unsuccessful efforts were made to get it started. On the 26th of March, after several alterations were made upon it, the machine was again started, and the trial continued continually down to the 22d of May, 1878, under the most favorable conditions. During the whole period from July, 1877, to May, 1878, the total cutting performed by the machine was about 954 cubic yards.

The defender expressed to the pursuers his dissatisfaction with the machine, and his belief that it was quite incapable of performing the stipulated amount of cutting.

(Cond. 7.) The machine was then, by the defender's instructions and concurrence, removed to and re-erected at Carfin, in terms of contract. This erection of the machine at Carfin was completed on or about the 9th of September, 1878. But here the conditions under which the machine was intended to be worked had been entirely changed from what existed or was contemplated at the time of making the contract, and did not admit of the application of the machine in the way intended, and so did not admit of its capability to excavate and fill the stipulated quantity of material being properly or fairly tried. In particular, the face of cutting to which it was to have been applied was entirely destroyed, so far as the proper application of the machine was concerned, by the introduction of men who carried forward by far the largest portion of the face of the cutting, so that there remained only a small portion, which could not and did not nearly furnish the machine with full work, or full scope to work. . . . The fair and proper working of the machine was not compatible jointly with manual excavators. Such a course of procedure was never contemplated, and, in fact, has never been attempted at any other work. The pursuers repeatedly asked the defender to afford them a fair opportunity of letting the machine be applied to its work properly, and, as was necessary, with a full face and without interruption, but he did not do so. Under the terms agreed on, had these necessary conditions been furnished or observed by the defender, the machine was capable of excavating and filling the stipulated quantity. Denied that it was at request of pursuers that the machine was taken to Carfin. The taking it to Carfin was in terms of the contract. 255] tract. *Explained that the machine had never be-

fore been tried at Carfin. Denied that defender was in a position to allow the machine to be tried on the 3d of August, and considerable delay was occasioned on account of his not being even ready at the 9th of September, 1878, the date at which the machine was ready. Denied that the defender made any conditions about the removal of the machine in the event of it breaking again. Admitted that the machine started work at Carfin on the 14th of September. Denied that it worked till the 9th of October. Explained that the machine only wrought a very inconsiderable number of hours at Carfin altogether, through the actings of the defender. The machine was fit for the contemplated work.

(Ans. 7.) Admitted that on the request of the pursuers the defender permitted them to make a further trial of the machine at Carfin. A suitable face there was ready for trial on the 3d of August, 1878. In consenting to a further trial at Carfin, the defender informed the pursuers that if the machine again broke down it would have to be removed, so as not to interfere with the progress of that cutting, which had to be proceeded with with the utmost dispatch. The machine accordingly started work at Carfin on the 14th of September, 1878, and continued till the 9th of October, 1878, when the pursuers' men ceased to work it, and it has not done anything since. During the above period, the total cutting done by the machine was about 126 cubic yards. For the whole period from July, 1877, to the 9th of October, 1878, the cutting done by the machine amounted in all to only 1080 cubic yards, or about three days' work. *Quoad ultra* denied.

(Cond. 8.) The defender called on the pursuers to remove the machine from Carfin, as he alleged it had not excavated and filled the stipulated quantity. The pursuers refused to do so, and the machine is still at Carfin. The machine was delivered to defender at Carfin, and is still in his possession there.

(Ans. 8.) Admitted.

The appellant's pleas in law were as follows :

(1.) The defender (appellant) not being due the pursuers (respondents) the sum sued for, or any part thereof, is entitled to absolvitor. (2.) The machine having failed on trial, the defender is not bound to accept. (3.) The sale of the machine being conditional on the trial, which has failed, the defender is not liable in the price thereof. (4.) The defender, not having committed any breach of contract, is not liable in damages. (5.) The action being unfounded in fact

and law, the defender is entitled to absolvitor, with expenses.

A proof was allowed by the sheriff substitute. From that it appeared that there had been a mutual alteration of the contract, so far as that the machine should be furnished by February, 1877. The reason for this alteration the appellant alleged was, the machine was not ready. When, however, the machine was ready, the appellant, through the alteration of the railway company's plans, was not ready to give the required test at Carfin, and it was agreed that the machine should be sent to the Garriongill cutting; the appellant *said on the footing that it should be tested there instead of at the Carfin cutting. The respondents, on the other hand, alleging that the machine was sent to Garriongill for the purpose of experiment, with a view to its being strengthened before it was tested at Carfin. The proof also contained the following facts. That in March, 1878, the machine commenced work at Garriongill, and worked on and off till the end of May. In that month the machine broke and was removed to the respondents' workshop. During the three months it had excavated 477 wagons of $2\frac{1}{2}$ cubic yards each.

On the 28th of May the appellant wrote to the respondents, requesting them before they took the machine to Carfin, to go and see the cutting there, and satisfy themselves as to whether they could excavate the amount of cutting with the machine that they guaranteed, and stating that that cutting would soon be commenced, and that he could not tolerate the stoppages to his work there, which had occurred at Garriongill. On the 2d of August the appellant wrote to the respondents, "if you are again intending to try the digger, I trust you will do so at once." On the 9th of September, 1878, the respondents wrote that the steam digger was ready for work at Carfin, and that as soon as the appellant had rails laid for its application they would proceed to prove its capabilities to dig and fill 130 wagons of $2\frac{1}{2}$ yards per day, as agreed to. On the 18th of September the machine commenced work at Carfin, on which day it excavated one wagon load; on the 19th it excavated thirteen wagons or $3\frac{1}{2}$ cubic yards; on the 21st, three wagons, and then broke down. On this the appellant wrote to the respondents, that the machine had never even approached the guaranteed quantity to be excavated, and trusted they would remove it.

The respondents replied, "The breakage was due to the

experiments at Garriiongill, which had no connection with the stipulated obligations at Carfin. At Carfin you are bound to give the machine a fair application to the material there, and after that to give us a month to test its capabilities at a fair face. Instead of that, you destroy the face by the introduction of men in place of the steam digger, and ask us to try it at a straggling end of a side piece of clay and boulders, in such a way as no machine of *the [257 kind was ever tried before, and where the machine could not, by any possibility, do one-sixth of its work. You have explained to us the difficulty between you and the railway company as to time, &c., but whilst we have every disposition to accommodate you as much as possible, we must nevertheless insist that you allow the machine to get a full and fair trial in fair stuff, after which, if it fails in the quantity now stipulated, viz. 350 yards, we will take it away free of cost to you, but not till then."

Again, on the 10th of October, the respondents wrote, that the machine had been again put to work at a face at which it had not proper scope. In acknowledging that letter, the appellant, on the 15th of October said: "You refer to the unreasonableness and illegality of my request to have the digger removed from Carfin. You must be well aware that these expressions are quite unjustifiable, as I expressed in my letter of the 28th ult., that the machine has never even approached the carrying out of your guarantee. It is now more than three months since the Carfin cutting was ready for the application of your machine, and in that time it has excavated about fifty wagons, or less than two cubic yards of earth per day. After looking at these figures, I think there is nothing unreasonable in again requesting you to remove the machine." The respondents, *inter alia*, reply: "You say the machine has never even approached the carrying out of the guarantee. Did you or any reasonable man, ever expect such a thing so long as the machine was only applied to an eight or ten feet face, with one quarter compass instead of fifteen or twenty feet, one with a full compass?" And they demand again a proper trial; and that demand was repeated in a subsequent letter. The appellant then repudiated any liability connected with the machine, the essential conditions on which alone he was willing to purchase not having been fulfilled.

The respondents finding that the appellant would not give them the opportunity of trying the machine at a fair face, raised this action in the Sheriff's Court, concluding for payment of the price of the machine, £1,115. The sheriff

substitute pronounced an interlocutor, finding that the appellant was bound to give the respondents' steam-navvy a fair trial at Carfin, and that he had not done so, and there-
258] fore he was liable as concluded for. The *appellant having appealed, the sheriff, on the 2d of December, pronounced, *inter alia*, the following interlocutor:

. . . . Find that the machine was in due time erected at Garriongill cutting, and was there tested: Find that it did not satisfy the guarantee, but completely broke down notwithstanding the pursuers had every opportunity afforded them during nearly two months of altering, amending, and adjusting, as they thought proper: Find that thereafter another opportunity was given them to prove that the machine satisfied the guarantee, and that they accordingly erected it at Carfin, where it was again tested: Find that this testing proved equally unsatisfactory with the former, and that, in consequence, it was definitely rejected by the defender: Find, in point of law, that the defender was entitled to do so, unless it could be established by the pursuers, that the failure of the machine to satisfy the guarantee was attributable to circumstances for which the defender was responsible, or for which at least they were not accountable: Find that the pursuers have failed in discharging the *onus* thus laid upon them: Find, therefore, that the pursuers having failed to satisfy the conditions of their contract, the defences fail to be sustained: Therefore recalls the judgment appealed against, and assoilzies the defender from the conclusions of the action.

The respondents thereupon appealed the cause to the First Division of the Court of Session, who pronounced the following interlocutor on the 21st of May, 1880:

Recall the interlocutor of the sheriff, of date the 2d of December, 1879: (1.) Find that the pursuers undertook to supply, and the defender undertook to purchase and pay £1,115 for, a steam-digging machine, in terms of the letters dated respectively the 21st and 22d of September, 1876: (2.) Find that it was a condition of the said contract, that the defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into wagons 350 cubic yards of clay, or other soft substances, within a day of ten hours, in a certain railway cutting which the defender was about to make, called the Carfin cutting, after it is fairly tried on a properly opened-up face: (3.) Find that it was impossible that the machine should have the stipulated fair trial, unless the defender provided a properly opened-up face at the said Carfin cutting: (4.) Find that the defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: (5.) Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the defender to pay to the pursuers the sum of £1,115, with the interest prayed for, in terms of the petition: (6.) Find the pursuers entitled to expenses in both courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted; and remit to the auditor to tax the account, or accounts, of said expenses, and to report⁽¹⁾.

Against the findings 3, 4, 5, and 6, the appellant appealed
259] to *this House. * * * *

Jan. 31 and Feb. 1, 3. *Sir F. Herschell*, S.G., and Mr. *Johnstone*, contended for the appellant, the essential obli-

(¹) Court Sess. Cas., 4th Series, vol. vii, p. 778; 17 Scot. Law Repr., 565.

gation of the contract here was to supply a machine by February, 1877, capable of doing a certain amount of work within a certain time. That obligation could not be cut down by any stipulation as to a properly opened-up face. In February, the respondents, it was clearly proved, were not ready with the machine. Accordingly the contract was altered as to time. In August, the appellant was ready to give the test at Carfin, but not till the 14th of September is the machine furnished, and after four days it breaks down, having utterly failed to do anything like the stipulated quantity of work. Under these circumstances they submitted the appellant was entitled, having regard to the failure at Garriongill, where it had an ample face and every necessity for a good trial, to say "you have not delivered to me within a reasonable time a machine capable of doing the amount of digging contracted for, and therefore I am not bound to give it another trial." It could not be the true construction of the contract as altered, that whenever the respondents chose to furnish a machine, even though manifestly incapable, that the appellant must go to the expense and inconvenience of giving it a trial at a properly opened-up face.

The evidence adduced in the Sheriff's Court amply established that a sufficient trial of the machine had been given to make it manifest to all that it did not conform to the contract. They submitted that issue was clearly raised by the appellant's pleadings. But the interlocutor of the court below contained no finding as to whether or not the machine conformed to contract, and as to other matters of fact raised by the appellant, which if found in his favor would entitle him to absolvitor. On these *grounds they asked [260 that the case should be remitted to the court below to pronounce findings on these matters of fact.

Their further argument is fully dealt with by the Law Peers in their opinions.

[They commented on—question of remit: *Fleeming v. Orr* (¹); *Duncan v. Scott* (²).]

Mr. *E. E. Kay*, Q.C. (with him Mr. *Webster*, Q.C.), maintained for the respondents, that it was one of the essential conditions of the contract, that the machine should be tested as capable of digging the material at the "Carfin cutting," that it was impossible to do that until the appellant, in whose possession the cutting was, gave facilities for it, namely, wagons, rails, and a "properly opened-up face."

It could not be said that the legal conclusion drawn from

(¹) 2 Macq., 14. (²) Court of Sess. Cas., 4th Series, vol. iii. (H. of L.), at p. 73.

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the facts was wrong—there was a contract of sale and delivery which made acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer by his act prevents the possibility of the seller fulfilling the condition. Upon these facts the court held as a matter of law that the condition must be held as implemented: See Bell's Prin., sect. 50; Erskine, 3, 35; and *Hunter v. Earl of Hopetoun* (*).

Secondly, the appellant could not show that a fact material to the legal result remained undisposed of. Instances of such omission might be found in *Fleeming v. Orr* (*); *Steel & Craig v. State Line Steamship Company* (*), but here no such fact was left unfound by the court.

The appellant did not contend that the machine was disconform to the specification, but he did contend that—notwithstanding there was no trial at Carfin on a properly opened-up face—that there ought to have been a finding that the machine was capable. The reason for the absence of such a finding was obvious. The test of what was a suitable machine was here expressly provided for by the terms of the contract. A sufficient machine under the contract was a machine which would do the stipulated amount of work at the stipulated trial at Carfin.

261] *Also, as the appellant had not raised on his pleadings the contention that he was relieved from complying with the stipulation of supplying a properly opened-up face and allowing a trial, by reason of there having been a demonstration of the incompetency of the machine by a trial which he had made, he was not able to have a remit to have that fact found in the findings. On these grounds he submitted that the findings of the court below were conclusive against the appellant.

[He also cited *Holtham v. East India Company* (*); *Planché v. Colburn and another* (*).]

Sir F. Herschell, S.G., in reply.

The Lords having taken time to consider judgment, pronounced the following opinions:

Mar. 7. LORD BLACKBURN: My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session, pronounced in reviewing the judgment of the Sheriff's Court of Lanarkshire, proceeding on proof taken on a record made up in the Sheriff's Court.

The Court of Session, in reviewing the judgment, had full

(*) 4 Macq., 972.

(*) 1 Durn. & East, 633-645.

(*) 2 Macq., 14.

(*) 8 Bing., 14.

(*) 3 App. Cas., 72; 24 Eng. R., 37.

power to find the facts on the proof; and to determine the law also. But the Legislature have, by the Judicature Act of Scotland, 6 Geo. 4, c. 120, s. 40, provided that—

When in causes commenced in any of the Courts of the Sheriffs, . . . or other courts, matters of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

The old rules of pleading in force in England at that time were founded on the strictest logic, often carried to an extreme which, when the pleadings were not managed by very skilful *hands, worked injustice, but always [262] founded on a principle. And those which regulated special verdicts, to which the Legislature here refers, were no exception. They are very accurately and fully stated by Chief Baron Comyns in his Digest, title Pleader. The following, I think, bear on the question what the Legislature intended :

The jury may find by their verdict all things given in evidence, if it be not contrary to the evidence or the admission of the parties. S. 4.

They cannot find a matter contrary to the record, and if they do, the verdict is void as to that. S. 16.

So the jury ought not to inquire of a thing which is agreed by the parties to the issue. S. 17.

So the jury cannot find matter out of the issue, . . . though the matter out of the issue destroy the plaintiff's title. S. 18.

The reason of this last rule, which at first glance may seem harsh, is that the defendant ought to have obtained in proper time leave to amend his pleadings, and not to rely on getting the jury to find on the evidence something never alleged by him, and which the plaintiff was not called upon to be prepared to contest.

Whether we take these rules of English pleading as our guide, or the rules of sense and logic on which they are founded, it seems to me clear that the Court of Session need not in their interlocutor notice anything on which the parties are agreed. It may be convenient to do so in order to make the other findings clear, but it cannot be necessary. And they ought not to find anything, even if destructive of the plaintiff's title, if it is not included in the issues joined; if it is necessary for the purposes of justice, they may, I suppose, allow an amendment, and remit the amended issue to the court below for further proof, or dispose of it on the

proof already given, as justice may require; but they ought not to find it in their interlocutor, on the record as it stands; and no complaint can be made in this House against them for not doing what they ought not to have done. This view of the statute of Geo. 4 renders it important to see what the record or issue is.

I have had the advantage of perusing the opinion of my noble and learned friend who is to follow me (Lord Watson), and as I agree entirely in all he says on this subject, I shall not repeat it⁽¹⁾.

263] *The interlocutor finds that the contract was in terms of the two letters, 21st and 22d September, 1876. It is a question of law what the effect of those letters was. I do not feel much doubt about that. The pursuers were to supply a machine capable of digging and filling into wagons at least 350 cubic yards of clay in a day. It was to be brought to the defender's cutting at Carfin, erected, and tested before February, 1877. Both agreed that the event of the testing was to be conclusive. If the machine did not answer the test, the pursuers were to remove it before the end of February; if it did answer the test the defender was to keep it and pay the agreed price.

I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances. In a very early case in England, in the Year Book of 9th Edward IV, Easter Term, 4 A, where the defendant was sued on an obligation, the condition of which was that, if the great bell of Mildenhall should be brought, at the cost of the men of Mildenhall, hall, to the house of the defendant in Norwich, and there weighed and put in the fire in the presence of the men of Mildenhall, and the defendant made a tenor of it to agree with the other bells of Mildenhall, the obligation should be void. Choke, then chief justice, and Littleton and Moile, then judges, held that a plea by the defendant that the bell was not weighed nor put in the fire was bad, for the defendant, being a brazier, it was his part to weigh it and put it in the fire; Needham, who was the fourth judge, thought that the weighing of the bell required no particular skill, and might as well have been done by the men of Mildenhall or

(¹) *Post*, p. 433.

those they employed as by the defendant. But he said that the putting it into the fire was the part of the artificer. And as I understand it, for the rest of the report is not very clear, a further point was mooted, and the serjeants agreed that if the defendant had put the bell in the fire, without seeing it weighed, he would have waived that which was but an incident, and been *as much bound to fulfil that [264 which was the substance of the contract, viz., to make a proper tenor, as if he had had it weighed. I mention this old case, decided in 1469, because it is on it that the different digests laying down the principle are all founded, and because I think it is obvious good sense and justice. Now, applying this principle to the present case; both agree that the machine shall be tested at Carfin, and therefore the pursuers agreed that they would bring the machine to the Carfin cutting, and there erect it on the defender's land, and there do their part in working it till there had been a fair test; and the defender agreed that he would do his part, and even if there had been no express mention in the letters of a properly prepared face, the nature of the thing shows that he agreed to let the pursuers have access to a part of the cutting, put by the pursuers in such a condition that the machine could be fairly tested by working at it, and to assist in working it there until there had been a fair test. If, then, the averments on the record had been that, before the end of March, 1877, the machine had been brought to Carfin cutting and there delivered to the defender, who required the pursuers to remove it, and it was still in his possession there, I think there could be no doubt that the four first findings in the interlocutor put a proper construction on the contract, which, being a matter of law, your Lordships are entitled to inquire into, and that, if they find the facts truly, into which your Lordships have no right to inquire, it would follow in point of law that the defender, having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the pursuers to remove it. And by his own default he can now never be in a position to call upon the pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it.

But the time when the machine was brought to Carfin and the defender refused a further trial was long after February, 1877; it was in September and October, 1878. Unless both

parties had agreed to enlarge the time, the original bargain would have come to an end by efflux of time in 1877.

265] *But it is agreed on the record that the time was enlarged, and the bargain in all other respects still in force at least as late as July, 1877, and the Court of Session was not called upon to repeat in the interlocutor what was agreed on the record by both parties. There is a controversy on the record as to the terms on which the time was enlarged; and the question raised on that, which is a question of fact, is disposed of by the last finding in the interlocutor, into the accuracy of which, it being a finding of fact, your Lordships are not entitled to inquire.

It was, however, argued at your Lordships' bar that that was another ground of defence appearing on the evidence. I think I state fairly, and as favorably to the pursuers as I can, the argument thus:

It was said that the repeated failures of the machine between July, 1877, and October, 1878, though, not being on the stipulated place and in the stipulated manner, they were not the test, nevertheless, coupled with the other evidence, showed that the machine was not such as could possibly in substance satisfy the contract. And that, therefore, the defender was justified, or at least excused, in refusing to incur further expense and trouble in putting in force a test which could not possibly turn out favorably to the pursuers, and that he was entitled to throw the machine back on the pursuers' hands, not on account of the terms of the bargain, but on the general ground that a purchaser is entitled to return a thing which has been delivered to him in fulfilment of a contract, and to demand back the price if paid, or refuse payment if not yet paid, if the thing delivered is not in substance the thing contracted for. On the principle of the civil law expressed in the Digest, lib. 18, title 4: "*Si æs pro auro veneat non valet.*"

I do not think it desirable to express an opinion on a point which it is not necessary now to discuss. I will, therefore, only say that the view I took of the law on this point in 1867 is expressed in a judgment of the Queen's Bench, which I delivered in *Kennedy v. Panama Mail Company* (*). The other judges of that court adopted that exposition of the law, and I have not yet seen any reason to change my opinion. But I agree that if such a defence had been raised 266] on the record in this case, the Court of *Session ought, in their interlocutor, to have found how much, if any, of the allegations were proved in fact. It is because, having

(*) Law Rep., 2 Q. B., 580, at p. 586.

carefully read the record, and having had the advantage of reading my noble and learned friend (Lord Watson's) observations on the record, I am clearly of opinion that no such defence was raised by the issue: that, I think, the Court of Session were not bound in their interlocutor to deal with it, even if it was made on the argument before them, which I think it was not.

I am, therefore, of opinion that the appeal should be dismissed, with costs.

LORD WATSON: My Lords, this appeal is brought against a judgment of the First Division of the Court of Session, by which the appellant, John Mackay, railway contractor, Wishaw, has been decerned to make payment to the respondents, who are a firm of engineers in Airdrie, of the sum of £1,115 sterling, being the price of a patent steam-excavating machine, manufactured and supplied by them to the appellant, as in implement of a written contract of sale entered into between the parties in the month of September, 1876.

The action was raised, and a proof was allowed and taken in the Sheriff Court; and it became the duty of the Court of Session, in reviewing the judgments of the sheriff's proceeding on that proof, to specify in their interlocutor, as required by sect. 40 of the Scotch Judicature Act (6 Geo. 4, c. 120), the several facts material to the case which they found to be established by the proof, and to express how far their judgment proceeded on the matter of fact so found, or on matter of law, and the several points of law which they meant to decide.

The specific findings upon which the decerniture against the appellant is rested in the judgment under appeal, are as follows:—[Reads the interlocutor of the court below (').]

In so far as these findings consist of matters of fact, the review of this House is excluded by the clause of the Judicature Act already referred to (').

The first two findings relate exclusively to the constitution and construction of the written contract upon which the action is laid, *and are, therefore, matters of law. [267 No appeal has been taken against these findings, and the appellant must be held to admit that they are sound. But the appellant is not thereby precluded from founding upon other conditions of the contract, or upon other views of the contract, so long as these do not involve the negation of what is affirmed by the findings in question.

In my opinion the third and fourth findings involve law as

(') *Ante*, p. 426.

(') *Ante*, p. 428.

well as fact, in so far as they assume or imply that the appellant was, by the conditions of the contract, bound to provide the "properly opened-up face" on which the machine was to be tried. So far as it is thereby found that, of the two contracting parties, the appellant alone had it in his power to provide a properly opened-up face in the Carfin cutting, and that the appellant did not provide such face, notwithstanding repeated demands on the part of the respondents, nothing appears to me to be involved except matter of fact.

The fifth finding appears to me to be one of fact only.

The appellant challenges the interlocutor under appeal upon two grounds. First of all, he maintains that, in respect there is no finding to the effect that the digging machine was conformed to contract, the facts as found are insufficient to sustain a decree for the contract price. Alternatively he asserts that there were important issues of fact raised by him in the court below, to which his proof was directed, but which the court has not disposed of; and he contends that, assuming the facts already found to warrant the decree appealed against, he will, upon these issues being decided, in his favor, be entitled to decree of *absolutor*. And it was contended that the House ought, with a view to the final disposal of the case, to remit to the First Division of the Court to pronounce findings upon these matters of fact.

In order to a due understanding of the interlocutor under appeal, and of the appellant's contention, it is necessary to refer to the closed record, which is the issue to which the proof of the parties was directed, and to which the findings of the court apply.

The respondents, in their condescendence (Articles 1 and 2), set forth the two letters of the 21st and 22d of September, 1876, which have been held to constitute the contract. The first in date bears to be a confirmation by the respondents of a verbal arrangement *between one of their partners and the appellant. [His Lordship read the first letter (').] The letter of the 22d of September, which is a confirmation of the preceding by the appellant, recapitulates the terms of the agreement in language somewhat different, but having, for all practical purposes, the same meaning.

The parties are agreed upon the record as to the following facts:—(1) that the machine was not ready, and was not sent to Carfin cutting before or during February, 1877; (2) that it was afterwards sent to Garriiongill cutting, and remained there from July, 1877, till May, 1878; and (3) that there-

(1) *Ante*, p. 420.

after, certain repairs and alterations having been made upon it, the machine was sent to Carfin cutting about the middle of the month of September, 1878, where it still remained at the time the action was raised. They are also agreed that from July, 1877, to August, 1878, the appellant was unable to proceed with his work at the Carfin cutting owing to a change of the plans of the railway company.

The parties join issue, however, upon the points following:—(1) the appellant alleges, but the respondents deny, that he was in a position to give a proper working face for testing the machine at Carfin cutting in February, 1877; (2) the respondents state that the machine was sent to and kept at Garriongill cutting merely for the purpose of experiment, with a view to its being improved and strengthened before it was tested at Carfin, whereas the appellant avers (Ans. to Cond. 5) that the parties “agreed that the machine instead of being tested at the Carfin cutting should be tried at the Garriongill cutting.”

The respondents (Cond. 7) aver in substance that the machine was sent to Carfin in order to its being subjected to the contract test,—that a proper working face was not provided by the appellant whilst the machine was at work there,—that the machine could not in consequence be fairly tried, and that “the machine was fit for the contemplated work.” The appellant (Ans. Cond. 7) admits that, “on request of the respondents,” he “permitted them to make a further trial of the machine; a suitable face was then ready for trial on 3d August, 1878. In consenting to a further trial at Carfin, the defender informed the pursuers that, if the machine *again broke down it would have to be removed [269 so as not to interfere with the progress of the cutting, which had to be proceeded with with the utmost dispatch.” The appellant meets the respondents’ allegations as to his failure to provide a suitable working face, and the fitness of the machine, with a direct negative, thereby asserting that he did provide a proper face whilst the machine was working at Carfin, and that the machine was not capable of performing the amount of work required by the conditions of the contract.

The 8th article of the condescendence for the respondents is in these terms:—“The defender (appellant) called on the pursuers (respondents) to remove the machine from Carfin, as he alleged it had not excavated and filled the stipulated quantity. The pursuers refused to do so, and the machine is still at Carfin. The machine was delivered to the defender

at Carfin, and is still in his possession there." The appellant's answer is, "Admitted."

The foregoing answer appears to me necessarily to imply an admission on the part of the appellant that the machine was delivered to him at Carfin cutting by the respondents as an implement of the contract, and that he rejected it because of its incapacity to perform the amount of work stipulated in the contract. And that must be read in connection with his previous assertion that the "further trial" at Carfin was made on a proper face. Taking all his averments together, they appear to me to disclose no ground of defence to the action, except one, that the machine was disconform to contract, as was evidenced by the fact that it had been subjected to the contract test by working at a suitable face, and had failed to perform the stipulated amount of work. And it is a notable circumstance that, neither in the opinion of Lord Shand, who carefully states the respective contentions of the parties, nor in the judgment delivered by Lord Mure, is there to be found the least indication of any other controversy having been raised before the Court of Session by the appellant.

This view of the appellant's record is borne out by his pleas in law. The only pleas which indicate any substantive defence to the respondents' claim for the contract price are these:

"2. The machine having failed on trial, the defender is not bound to accept it.

270] *"3. The sale of the machine having been conditional on the trial, which has failed, the defender is not liable in the price thereof."

Such being the shape of the record or issue to which the findings of the Court of Session are applicable, I am of opinion that the findings in the interlocutor appealed against are in themselves sufficient to entitle the respondents to decree for the price of the machine. The terms of the contract seem to me to imply very plainly that it was incumbent on the appellant, and not upon the respondents, to provide "a properly opened-up face" for the trial of the machine. Then the court negatives the existence of the agreement, alleged by the appellant, to substitute Garriongill for Carfin cutting as the place of trial; and find in substance that the appellant failed to provide a proper face at Carfin cutting, "notwithstanding repeated demands" on the part of the respondents. The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the

appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand from Bell's Principles (§ 50) to the effect that, "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognized in the law of Scotland, and I think it ought to be applied to the present case.

It was argued for the appellant that the condition was only intended to operate in his favor, and that he might therefore dispense with it and defend himself upon the ground that the machine was, in point of fact, disconform to contract. But I cannot regard the stipulation in that light; it was so obviously for the interest of the manufacturers of this new patent machine *to have the question, whether it was or was not conform to contract, determined by reference to a simple and definite test, instead of being left to the uncertainty of speculative opinion, aggravated by the risk of litigation.

I now proceed to consider whether, before disposing of this case, any remit should be made to the court below.

As I understood the appellant's argument, he desired to have an opportunity of asking findings from the Court of Session to the effect that (1) the machine was disconform to contract, and (2) that the trials of the machine, though not to be regarded as equivalent to the test provided by the contract, made its disconformity to contract apparent to all concerned. Various other points were suggested for remit, but they appeared to me to be mere afterthoughts, and being unable to find any trace of their having been made grounds of reference in the record, I take no further notice of them. In the case lodged for the appellant, his pleadings upon the facts, which include a great deal of unnecessary observation upon the proof led in the cause, are thus summed up (Case, p. 38) — "The only fact found by the interlocutor is that the appellant failed to provide a properly opened-up face in cutting. It is submitted that this finding does not, in point of law, warrant the finding that the appellant

is liable to pay the sum of £1,115 and expenses. It is consistent with the facts found that the machine was not in fact according to contract, and that such trials as there had been afforded ample evidence of this. If this be so, it is submitted that the appellant would not be liable to pay for the machine, and it is contended that the evidence establishes these facts, or, at all events, that the machine did not comply with the contract."

In the view which I have taken of the judgment under appeal, any general allegation by the appellant, to the effect that the machine was not conform to contract, is irrelevant, because, according to that view, the machine must be held to have satisfied the contract test, which was not applied, owing to the default of the appellant.

As to his other allegation, that, "such trials as there had been" made it clear that the machine was disconform to contract, I doubt whether it is to be found on the record, 272] and, even if it be, I have *no doubt of its irrelevancy. No such statement would, in my opinion, afford a relevant answer to the case disclosed by the interlocutor under appeal, unless it amounted to this, that the machine was so disconform to the specification, or so palpably deficient in working power, that the respondents were not in *bona fide* to tender it to the appellant as in implement of the contract. I need only add that I have not heard it suggested in argument that any such case has been made by the appellant, on record or elsewhere.

In appeals falling within the scope of the 40th section of the Judicature Act, 1825, I humbly conceive that this House has no concern with the proof which has been led in the Sheriff's Court. When it can be shown that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the court below to pronounce findings upon these questions, but that can only be shown by a reference to the record, and not to the proof. It would, in my opinion, be productive of great inconvenience if the House were to make remits upon matters of fact which are not very plainly set forth upon record, as substantive grounds either of pursuit or of defence.

I am accordingly of opinion that the application for a remit which has been made by the appellant's counsel, ought not to be entertained, and that the judgment under appeal must be affirmed, with costs, and the appeal dismissed.

LORD SELBORNE, L.C.: My Lords, having had an opportunity of reading in print the judgments which have now

been delivered by my two noble and learned friends, and agreeing with them, I think it unnecessary to add anything further.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, March 7th, 1881.

Agent for appellant: *William Robertson.*

Agents for respondents: *Simson & Wakeford.*

See Ante, 215 note.

Where, by the terms of a contract of sale, defendant agreed to pay plaintiff \$5,000 of the purchase-money on the execution and delivery of conveyances of plaintiff's half-interest in certain foreign patents, and the balance within one year, the making by defendant of the first payment without insisting on the delivery of the conveyances, does

not preclude him from insisting on the provisions of the agreement giving him one year from the execution and delivery of the conveyances before the maturity of the first payment, and suit brought in less than one year from the tender of the conveyances for final payment is prematurely brought: *Hubbell v. Southard*, 18 N. Y. Weekly Dig., 868.

[6 Appeal Cases, 273.]

H.L. (Sc.), March 7, 1881

[HOUSE OF LORDS.]

***LORD BLANTYRE and Another, Appellant; THE CLYDE NAVIGATION TRUSTEES, Respondents. [273]**

Navigable River—Right of the Clyde Trustees to dredge Foreshore, the Property of the Riparian Proprietor—Clyde Navigation Consolidation Act (21 & 22 Vict. c. 149), ss. 76, 84.

The Clyde Navigation Trustees, being empowered by sects. 76 and 84 of 21 & 22 Vict. c. 149, to dredge the bed of the river Clyde to a depth of seventeen feet, cannot be indicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their acts of Parliament.

Held so, affirming the decision of the court below, but without prejudice to the question of their liability to subsequent compensation for damage.

See 33 Eng. R., 533, 559 note.

Iowa: *Wood v. Chicago*, Rock Isl. and, etc., 60 Iowa, 456.

New York: *People v. Thompson*, 1 N. Y. Cr. R., 501.

Ohio: *R. R. Co. v. Carr*, 88 Ohio St. R., 448.

Oregon: *Shaw v. Oswego*, 10 Oregon, 371.

United States: *Potomac, etc., v. Upper Potomac, etc.*, 109 U. S., 672.

[6 Appeal Cases, 295.]

H.L. (Sc.), March 24, 1881.

[HOUSE OF LORDS.]

295] *SCOTT and Others, *Appellants*; HOWARD and Others, *Respondents*.

Personal and Real Property—Privileges stipulated for in Conveyance of Heritable Subjects—Jus quassitum tertio—Theatre.

Trustees acting for the shareholders or rentallers of a theatre, called the Queen's Theatre and Opera House, who had obtained a feu right to the site, granted in 1858 a disposition of the ground and buildings to one J. B., subject, *inter alia*, to the real burden of a perpetual annuity of £2 per share to each rentaller of the said Queen's Theatre and Opera House, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignee or successors of such, should at all times be entitled, *inter alia*, to free admission to the auditorium of the said Queen's Theatre and Opera House; also declaring that J. B. should not convert the said theatre to any other use; and that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise.

In 1865 the theatre was entirely destroyed by fire, and was rebuilt by J. B.'s trustee and called by another name.

In 1875 it was again entirely burnt down, and again rebuilt.

From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. But in 1879 disputes arose as to the validity of the rentallers' right to, *inter alia*, the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 and the succeeding conveyances to the same privileges in the new theatre which they had in the first:

Held, affirming the decision of the court below, that the privileges conferred on the rentallers by the original dispositions—other than the payment of the annuities, which was constituted a real burden—rested only on the personal obligation of the original donee, and were confined to the theatre then in existence; and that the subsequent deeds, to which the rentallers were not parties, were not intended to, and did not, confer on them any new right.

APPEAL from the Second Division of the Court of Session, Scotland.

296] *This action was originally raised by Thomas Scott and others, the appellants, as trustees for a body of persons known as rentallers or shareholders of the Theatre Royal, Edinburgh, who claim certain rights of admission to that theatre, against the respondents Messrs. Howard and Logan, lessees of the theatre, and the Edinburgh Theatre Company, Limited, who are the proprietors.

The questions raised are (1.) whether the rentallers are individually entitled at all times to free admission to the auditorium of the theatre, except to certain private boxes,

and to book and secure their places beforehand without charge whenever that privilege is enjoyed by the public; and (2.) whether the appellants, as trustees, have the sole and exclusive right to use the private box in the theatre set apart for them, and to occupy the same by themselves or others to whom they may give permission to occupy it.

Previous to 1829, the ground on which the theatre was built was devoted to the purpose of a circus, which was afterwards converted into a theatre called the Caledonian Theatre. In 1829 the lease of the ground and buildings was acquired by a body of shareholders, called rentallers, of whom the present appellants are the successors, and the theatre received the name of the Adelphi Theatre.

In May, 1853, that theatre was destroyed by fire, and while it was in the course of being rebuilt by the shareholders, they obtained from the governors of Heriot's Hospital, who had become owners of the site, a feu charter dated the 13th of November, 1854, by which the former leasehold right was changed to a feu right. This charter was in favor of Dr. Robert Jefferiss and others, "in trust for behoof of such person or persons as now or shall hereafter become shareholders of the edifice or building now in course of being erected on the site of the Adelphi Theatre, and premises therewith connected, all lately destroyed by fire. In this charter the shareholders are taken bound to erect and maintain buildings of the value of £2,000; but it does not require that they shall use it as a theatre.

The theatre when rebuilt was called the Queen's Theatre and Opera House, and opened in 1855.

*In 1857 the shareholders sold the theatre to Mr. [297 John Brown of Marlie, and a disposition in his favor was granted by Dr. Jefferiss and others, as trustees, dated the 28th of May, 1858. The subjects conveyed to Mr. Brown were the whole area on which the theatre stood, together with the theatre itself, and the shops and others adjoining thereto, with the whole furnishings and fittings. The chief consideration given by Mr. Brown for the sale was his undertaking to relieve the trustees of all debts upon the building, which debts amounted to about £14,000; secondly, it was expressly provided and declared that the subjects were disposed under the real burden of payment of a perpetual annuity of £2 per share to each of the shareholders or rentallers of the theatre, whose number was about 100, and whose names were inserted in a schedule signed as relative to the conveyance, and to their respective successors and assigns; and thirdly, it was further provided and declared,

that each of said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, shall at all times be entitled to free admission to the audience department of said theatre other than the present private boxes and the box presently set apart for us, the first and second parties hereto, as trustees aforesaid, and which box shall continue to be set aside for the sole use of us, the said first and second parties, as trustees aforesaid and our successors in office; but declaring that said right of free admission shall be personal to each shareholder or rentaller, and that such shareholder or rentaller shall not be entitled to substitute any one in his or her right to admission, to whom the share itself shall not have been transferred in manner before expressed; and further, in the event of a share being acquired by more than one individual, only one of such individuals shall be entitled in virtue thereof to free admission to said theatre as aforesaid, and also providing and declaring that the said John Brown and his foresaids shall not be entitled, without the consent of the said shareholders or rentallers and their foresaids, to convert the said theatre and opera house to any other use or purpose than a theatre and opera house; and also providing and declaring that the said theatre and opera house shall be kept open for performance during at least six months in each year." In the following July Mr. Brown died uninfert; and infertment on 298] *the disposition in his favor was taken by Mr. William Shaw Soutar his testamentary trustee.

In 1865 the theatre was again destroyed by fire; and in 1866 Mr. Soutar built on the same site another theatre at a cost of £17,000. The new theatre was opened as the Theatre Royal, and, as had been the case in the previous edifice, a private box was set aside for the sole and exclusive use of the trustees; and the shareholders or rentallers exercised their right of free admission in terms of the declaration in their favor in the disposition to Mr. Brown, and in Mr. Soutar's sasine of 1858.

In 1874 Mr. Soutar, as Mr. Brown's trustee, sold this theatre to the present defender Mr. Logan for £11,000, with entry at Martinmas, 1874; but before the price was paid, and any conveyance delivered, the theatre was entirely destroyed by fire on the 6th of January, 1875. The building had been insured for £12,000, and Mr. Logan having, after some delay, received a conveyance to the subjects proceeded to re-erect a theatre on the site. In this disposition, which was recorded on the 27th of April, 1875, the subjects were disposed to Mr. Logan, his heirs and assignees, "with

and under the real burdens, provisions, declarations, and others specified in the instruments of sasine, dated 1858, in favor of Mr. Soutar as Mr. Brown's trustee, "declaring that the whole subjects are so disposed with and under and subject to the whole burdens incumbent on me the said William Shaw Soutar as trustee aforesaid, or on the trust estate of the said John Brown under the titles of said subjects, . . . and specially without prejudice to the said generality the said William Hugh Logan and his foresaids shall henceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in the schedule hereto annexed, and to the successors or assignees of said rentallers or shareholders, and to such other person or persons as may establish their right as shareholder or shareholders, and allow these parties the privileges to which they are entitled."

Mr. Logan while in the course of erecting the theatre, sold it to the Edinburgh Theatre Company by disposition dated and recorded on the 23d of December, 1875. This conveyance contained similar conditions as to paying the annuity to the rentallers or shareholders, and as to allowing "these parties the privileges to *which they may be entitled," [299 as in the disposition in favor of Mr. Logan. There was also attached to this disposition a schedule containing the names of 104 rentallers or shareholders.

The Edinburgh Theatre Company, Limited, was incorporated under the Companies Acts, 1862 and 1867. And in the prospectus issued by the promoters it was stated that one of the principal burdens on the property was the annual payment of £2 per share to each of eighty-two renters, who were also entitled to free admissions.

In 1876 the theatre was opened under the name of the Theatre Royal by Mr. Logan and Mr. Howard as co-lessees under a lease from the proprietors. By this lease, dated the 24th of December, 1875, the subjects were let to Messrs. Logan and Howard under an obligation to keep the theatre open as a place for dramatic and theatrical entertainments therein for a period of not less than six months in each year, and under the special provision and declaration that the rentallers should be entitled to all rights of admission to which they were entitled under the provisions contained in the disposition of 1858 by Dr. Jefferiss and others, to Mr. Brown. The lessees are also taken bound "to set apart for the sole use of the trustees of the said rentallers or shareholders and their successors in office in the event of the said

at Carfin, and is still in his possession there." The appellant's answer is, "Admitted."

The foregoing answer appears to me necessarily to imply an admission on the part of the appellant that the machine was delivered to him at Carfin cutting by the respondents as an implement of the contract, and that he rejected it because of its incapacity to perform the amount of work stipulated in the contract. And that must be read in connection with his previous assertion that the "further trial" at Carfin was made on a proper face. Taking all his averments together, they appear to me to disclose no ground of defence to the action, except one, that the machine was disconform to contract, as was evidenced by the fact that it had been subjected to the contract test by working at a suitable face, and had failed to perform the stipulated amount of work. And it is a notable circumstance that, neither in the opinion of Lord Shand, who carefully states the respective contentions of the parties, nor in the judgment delivered by Lord Mure, is there to be found the least indication of any other controversy having been raised before the Court of Session by the appellant.

This view of the appellant's record is borne out by his pleas in law. The only pleas which indicate any substantive defence to the respondents' claim for the contract price are these:

"2. The machine having failed on trial, the defender is not bound to accept it.

270] *"3. The sale of the machine having been conditional on the trial, which has failed, the defender is not liable in the price thereof."

Such being the shape of the record or issue to which the findings of the Court of Session are applicable, I am of opinion that the findings in the interlocutor appealed against are in themselves sufficient to entitle the respondents to decree for the price of the machine. The terms of the contract seem to me to imply very plainly that it was incumbent on the appellant, and not upon the respondents, to provide "a properly opened-up face" for the trial of the machine. Then the court negatives the existence of the agreement, alleged by the appellant, to substitute Garriiongill for Carfin cutting as the place of trial; and find in substance that the appellant failed to provide a proper face at Carfin cutting, "notwithstanding repeated demands" on the part of the respondents. The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the

appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand from Bell's Principles (§ 50) to the effect that, "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognized in the law of Scotland, and I think it ought to be applied to the present case.

It was argued for the appellant that the condition was only intended to operate in his favor, and that he might therefore dispense with it and defend himself upon the ground that the machine was, in point of fact, disconform to contract. But I cannot regard the stipulation in that light; it was so obviously for the interest of the manufacturers of this new patent machine *to have the ques- [271] tion, whether it was or was not conform to contract, determined by reference to a simple and definite test, instead of being left to the uncertainty of speculative opinion, aggravated by the risk of litigation.

I now proceed to consider whether, before disposing of this case, any remit should be made to the court below.

As I understood the appellant's argument, he desired to have an opportunity of asking findings from the Court of Session to the effect that (1) the machine was disconform to contract, and (2) that the trials of the machine, though not to be regarded as equivalent to the test provided by the contract, made its disconformity to contract apparent to all concerned. Various other points were suggested for remit, but these appeared to me to be mere afterthoughts, and being unable to find any trace of their having been made grounds of defence in the record, I take no further notice of them. In the case lodged for the appellant, his pleadings upon the facts, which include a great deal of unnecessary observation upon the proof led in the cause, are thus summed up (Case, p. 36):—"The only fact found by the interlocutor is that the appellant failed to provide a properly opened-up face at the Carfin cutting. It is submitted that this finding does not, in point of law, warrant the finding that the appellant

privileges, and undertakes to satisfy them ; and it followed that though it might be doubtful whether the appellants could make the original disponees or his assignees rebuild the theatre, yet so long as the ground was occupied by a theatre the privilege of the appellants remained in force ; and the reinstating of the theatre was a reproduction of the theatre, and the privileges attached. Even if the right was held to be extinguished with the original theatre, still it was within the competency of successive disponers to expressly constitute the right. And this they had by the direct obligation undertaken in the deed of 1874 by the fresh disponee to allow the appellants the privileges claimed, and whether the disponent in that deed considered the parties were entitled to the right or not, that did not matter, the right of the party claiming did not depend on the belief of the party making it, but upon the obligation made. They submitted that under the deeds and the continued usage the appellants were entitled to the privileges claimed.

Sir F. Herschell, S.G., and *Mr. E. E. Kay*, Q.C. (with them *Mr. J. Rhind*), contended for the respondents that in the deed of 1858, on which the appellants mainly depended, there was no provision for the perpetual existence of the rights claimed by them. The language used was only applicable to the then present theatre ; and the absence of any clause as to rebuilding or even insuring the theatre [con-302] firmed this view. Further, they submitted *the language was specially chosen so that the right should not be perpetual, for it must have been in the parties' minds in 1858, that the theatre might be burnt down again, and that the land might be leased out for something very different. As long as it could be said that it was the same "said theatre," however much altered, the right is not gone ; but that could not be said. Then the appellants not having the rights claimed in regard to the present theatre, under the deed of 1858, those rights were not created by the subsequent deeds. For the proper construction to be put upon the clauses in the disposition by *Mr. Soutar*, in 1874, was, that they were not donative clauses to the spoliation of the trust, but defensive clauses specially chosen to exclude any idea of creating a new right which did not exist before.

They did not dispute that a deed may stipulate for a benefit or a right to enure to a person not a party to the deed ; but to prove that, it must be shown beyond doubt that it was the intention of the parties to the deed to create that right, *Podché v. Brown* (¹) ; but it was impossible to

(¹) 3 Macq., at p. 71.

say that when a man makes a contract "to allow certain parties the rights they are entitled to," that was creating a new right.

Then with regard to the practice of the appellants, practice alone never can reconstitute upon a Scotch heritable subject—and English law is similar—a condition or privilege stipulated in the title to the subject, which has become extinguished. At best, practice is an exponent of ambiguous words only when it is the practice of the users of the word. It then shows what the users of the words meant by them.

The Solicitor-General for Scotland, in reply.

The Law Peers delivered judgment as follows :

EARL CAIRNS : My Lords, this case lies in an extremely short compass, and for the purpose of the observations which I have to submit to your Lordships it will not be necessary for me to refer to more than two of the deeds or documents which have been commented upon in the argument.

*I will take, in the first place, the deed of 1858. If [303. it is the case that that deed confers upon those who are called in it the rentallers, and who are represented by the appellants at your Lordships' bar, a right to have free admissions into whatever theatre may from time to time stand upon the ground mentioned in that deed, then of course, inasmuch as the present theatre is standing upon that ground, the appellants are right in their contention, and do not require to refer to the other documents in the case. My Lords, that deed of 1858 is in the nature of a disposition in favor of one John Brown, who appears to be one of a certain number of persons who had carried on for some time prior to 1858 the Queen's Theatre and Opera House in Edinburgh as an adventure, in which they were all interested, and the expenses of which they had, in some way or other, among themselves provided. They appear, for some reason, to have been anxious to change that state of things, and for the future to make John Brown the person who would be the owner of the property and who would carry on the theatre ; and, accordingly, the deed is itself a conveyance to this John Brown.

Now, the consideration of the deed appears to me to be that John Brown, in place, as I understand it, of paying the purchase-money to them, undertook to pay, and in point of fact did pay, the debts owing upon the concern and relieve his co-adventurers of those which were not actually paid by him at the time. That was the consideration on the one

side. In return, the co-adventurers seem to have had two considerations passing to them. The one was a burden upon the property of an annuity of £2 sterling to each of the rentallers, that sum, I suppose, representing in some rough way the interest upon the money which each had contributed. The other was certain conditions for free admissions which were secured to them.

What passed to John Brown was the ground upon which the property stood (which, I understand, was held in feu of the governors of Heriot's Hospital), and the edifice, which is thus described: "The edifice now called the Queen's Theatre and Opera House, and the shops and others adjoining thereto or connected therewith, all erected on the area or piece of ground above described, and the whole furnishings 304] and fittings of and in *said whole buildings, as well heritable as movable." We all know that the furnishings and fittings of a theatre, the movable property, are generally of very considerable value. No doubt they represented an important item in that which was conveyed to John Brown. Then, to pass over a provision for the payment of the annuity of £2 to each rentaller, the privilege of free admission is thus described: "Providing and declaring that each of the said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, shall at all times be entitled to free admission to the audience department of said theatre, other than the present private boxes and the box presently set apart for us, the first and second parties hereto, as trustees aforesaid, and which box shall continue to be set aside for the sole use of us, the said first and second parties, as trustees aforesaid, and our successors." Then, further on, "in the event of a share being acquired by more than one individual, only one of such individuals shall be entitled in virtue thereof to free admission." Then it provides and declares that Brown shall not be entitled, without the consent of the shareholders or rentallers, "to convert the said theatre and opera house to any other use or purpose than a theatre or opera house," and also providing and declaring that the said theatre and opera house shall be kept open for performance during at least six months in each year; and in the event of the said John Brown, or his foresaids, letting the said theatre and opera house to the lessee or tenant for the time being of the Theatre Royal, Edinburgh, he shall take such lessee or tenant bound so long as he continues tenant or lessee of said Theatre Royal, to give the shareholders or rentallers of the said Queen's Theatre and Opera House free admission to the said Theatre Royal."

Now, my Lords, every word of that is a stipulation guardedly and carefully connected with this "said Theatre Royal;" that is to say, the edifice which then stood upon the ground called by that name. It appears to me that, stopping there, there is nothing in any one of those sentences which would enable you to say that if, without any act done by Brown himself, something has happened which causes that edifice entirely to disappear and no longer to be in existence, there is an engagement on the part of Brown to give this right of free admission to a wholly different building. Supposing *it had been the case that, under the last {305 sentence I read, in place of continuing to occupy it himself, he had let the building to a tenant, and the building had disappeared, so long as that building was there he was bound to make the tenant agree to continue the right of free admission; but could it be contended that the tenant would be under an obligation if he subsequently substituted a different building upon the property, to continue this free right of admission? It was put in argument by the learned counsel at the bar, Would John Brown be bound, or would his tenant be bound, if the theatre was burnt down, to build upon the ground another theatre? Might he not build a house of a different kind? It would be very difficult indeed to contend that there was anything here which would oblige him to replace the theatre, if it was burnt down, by another theatre. There is no such contract in any part of the document.

Then let us see what the reason of the thing would lead us to expect to find. This theatre, as I pointed out, with all its furniture and fittings, was provided, apparently, in the first place, by the money of the adventurers, and that money was repaid to them by Brown as the purchase-money for the theatre. It was quite natural that when they were dealing with that which had been provided by their own money, they might, as part of the consideration in parting with it, in favor of Brown, make a stipulation for free admission into that building which they virtually had built; but is there any such reason for supposing that, without any stipulation binding them to contribute to the expense of a new theatre, they could have imagined that they would have a similar right to extend their right of free admission into another theatre, provided, not by their own money, but by the money of another person? Then, again, if it had been intended that this right of admission should pass from the existing theatre to a new theatre, one would have expected to find stipulations as to effecting insurance, as to keeping

up the insurance, as to employing the money secured by the policy in rebuilding a theatre of a similar kind if the existing one had been burnt down; and, indeed, express stipulations as to the new building and the right of admission to the new building. But we find nothing of the sort, and yet it is impossible not to see that the possibility of the 306] theatre *being burnt down would be in the minds of those who were entering into this contract, because in point of fact the theatre had been burnt down only a few years before.

My Lords, I therefore come to the conclusion that upon this deed, if it stood there, and if the question had been brought before your Lordships, no other deed having intervened, but the theatre having been burnt down and rebuilt, we will say by Brown or by some one representing him, if the case had arisen upon that state of things, I do not see how any one of those rentallers could have maintained seriously his right to have a free admission into the new theatre. Indeed, I am bound to say that I do not think that the learned judges of the court below, who took the view for which the appellants contend, rested their opinions so much upon the deed of 1858 as upon the subsequent deed.

Then, my Lords, as to the subsequent deed the case is this: it is said, even supposing that we, the appellants, cannot support our case upon the deed of 1858, still after the theatre was burnt down and after a new theatre was erected, there comes another deed in 1874 (in the meanwhile the property had passed from Brown to his trustee Soutar), and in that other deed there are stipulations contained, no doubt, as between Soutar and the person to whom he was selling, by which Soutar stipulated in favor of the rentallers in words which seemed to secure to them this right of free admission, and the person who took under this deed from Soutar was therefore bound by that deed to give those rentallers the right which Soutar stipulated for in their favor, whether they would or would not have been entitled to that right under the earlier deed.

Now there again, my Lords, I am bound to say in the first place, that it would have been a very singular thing if Soutar had been found to have stipulated in favor of the rentallers for these rights, supposing they had not got them already. Soutar had no interest in doing so; he was not in any way concerned for the rentallers, he was simply acting as the representative of the estate of John Brown, and trying to do the best he could for that estate, trying to get the largest sum of money he could in parting with this property. Of

course the closer the bargain he was making for conditions for third persons, the less he would get for that estate. I therefore certainly should expect to find very clear and *unambiguous provisions before I could come to the [307 conclusion that Mr. Soutar, of all people in the world, was securing for those rentallers something which the rentallers were not entitled to. But, on the other hand, looking at Mr. Soutar's position, it is exactly what one would expect to find, that in selling this part of the estate for which he was a trustee he would take very good care that he would not, by anything that he did in his conveyance, prejudice any existing right on the part of third parties, because in doing so he would very possibly bring upon himself, or bring upon the estate of which he was a trustee and representative, some claim from those persons whose rights he might thus be supposed or alleged to have prejudiced by the form of his conveyance.

That, of course, my Lords, is merely an *à priori* observation, and does not decide the case. It may be that the words are so clear that we shall find that the rights were actually created for the benefit of the rentallers, but if any other exposition can be given to the deed, that other exposition would certainly be more in accordance with the antecedent probability of the case.

Now when I look at this deed of 1874 (I will not complicate the case by referring to the subsequent lease) the words in that deed seem to me to be nothing more than words of ordinary style, fitted and calculated for passing on to the person taking under the deed any obligation which at present was existing in connection with the property, not at all words which in any way necessarily create any new obligation or new benefit for any third party:—"Declaring always that the whole subjects and others hereby disposed, are so disposed with and under and subject to the whole burdens and others incumbent on me the said William Shaw Soutar, as trustee aforesaid, or on the said Allan McLaren Brown, or on the trust estate of the said John Brown, under the titles of said subjects from and after," a certain date, "and specially without prejudice to the said generality, the said William Hugh Logan and his foresaids shall thenceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in the schedule," "and allow these parties the privileges to which they are entitled." There is no enumeration of the privileges; there is not even a recital here in the earlier part of the deed of certain privileges of free entry. There is *simply a [308

use of those general words in order to answer which you must first satisfy yourselves as to what the privileges are to which the persons at that time were entitled, that is to say, entitled in point of law. It is not to continue to them advantages which they had been used to have, which they were enjoying *de facto*, but to continue to them privileges which they were entitled to *de jure*. That is what is secured to them and only that.

My Lords, I cannot see there a single word which in any way creates for and third party any new privilege. It leaves the rentallers in the enjoyment of everything they had in point of law and gives them nothing further. That I understand to be the view which was taken by the majority of the learned judges in the Court of Session. It seems to me most satisfactory, and I therefore move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN: My Lords, I so entirely agree with what has been said, that I scarcely think it necessary to do more than point out the particular things upon which I think the matter turns, and say that I agree in what has already been said upon them.

I think the first question of all is upon the deed of 1858. What was it that the parties meant by that deed, and what is the effect of the instrument as far as regards this privilege of admission to the theatre? It seems quite clear that it was agreed first of all that there should be an annuity of £2 a year secured upon the land as a real burden, and it was intended that that annuity should be transmitted with each share, and a special manner was provided in which the share might pass. Then there was added that besides the annuity passing with the share, there should also pass the privilege of free admission after mentioned, and that privilege of free admission after mentioned is stated at page 39, letter B, in these words: "be entitled to free admission to the audience department of the said theatre, other than the present private boxes," and so forth. Now what does that mean? It would have been perfectly competent to the parties, if they had wished it, and had expressed it, to say there shall be free admission to this present existing theatre, so long as this present existing theatre continues 309] to exist, and no longer. If they had said *that, nobody could have doubted their meaning or that it could be carried out. Or they might have said, there shall be a right of free admission to this present theatre so long as it exists, and if this present theatre is destroyed by fire or other acci-

dent the disponent shall be obliged to erect another theatre, and give us a similar right of admission into the other theatre when it is erected. They might have done that, but certainly it is pretty clear upon this deed that they have not done it. There would have been a great many provisions required to be made if they had been going to do that; it would have been necessary to provide who should furnish the money, and so on. But there is nothing said about it.

My Lords, there is a third provision—what I may call a halfway provision, which they might have agreed to—they might have said: “we (the rentallors) shall be entitled to free admission to this theatre as long as it exists, and if it perishes by fire, the disponents shall be under no obligation to rebuild it, but if they should rebuild the theatre they shall be under an obligation to give us free admission into the new theatre when rebuilt, as much as into the old one.” There would have been the same difficulties to some extent as before—nearly all the same difficulties as before if that had been done—difficulties about providing who was to furnish the money and so on. I mention this, because I think that the Lord Ordinary, though he does not in express terms say so, must have persuaded himself that the meaning of the deed of 1858 was to adopt the middle course I have spoken of. He does not give his reasons for that, and I have looked in vain to find them. I do not think that that would be the natural and *prima facie* thing that one would expect the parties to do, and I cannot find a single word in the deed of 1858 doing it.

I come, therefore, to the conclusion that under the deed of 1858 the shareholders would have a right of free admission to the theatre as long as that theatre continued to exist, and yet when that theatre was destroyed by fire, that right of free admission was gone—had perished with the theatre—and was not revived when the new theatre was built in its place. That I think is the opinion of the majority of the learned judges of the Court of Session, that is to say, of the two judges whose opinion at present stands; and I can only say that I agree in it.

*Then it was said (and that, I think, is the ground [310 upon which Lord Ormidale put it) that the right was given by a subsequent deed of conveyance. I do not think it is necessary to refer to the same terms in subsequent deeds, because in the deed of 1874 these are the words which are relied upon. In that deed there is a conveyance of this property subject to all the burdens that were imposed by the deed of 1858; and then come the words, “and specially

without prejudice to the said generality the said William Hugh Logan" shall pay annually the sums or annuities due to the rentallers or shareholders, and their successors and assignees, "and allow these parties the privileges to which they are entitled." Now it is to be observed that that is mentioned "specially and without prejudice to the said generality," as one of the burdens imposed by the deed of 1858, and if the burden imposed by the deed of 1858 had been a burden to admit them to the same privileges in any subsequently-built theatre, I have little doubt that that would have continued it to them. But if there was not that burden to admit them to any subsequently-built theatre, can it be said that this creates *de novo*, and gives a fresh right to these rentallers, and that it was intended to do that by these words? I think not. I think you must look at the words in their natural meaning and signification, and I am convinced that it must have been the object of the parties to say this: We do not say whether or no under the deed of 1858 you, the rentallers, have a right to enter into the substituted theatre as you had into the old one. Mr. Sontar, judging from his expression, seems to have rather assumed that they had; but the parties do not say in the deed whether they have it or not. They say, If the rentallers have that right, we specially agree that you, the dispoonees, must keep it up, but we do not settle one way or the other whether they have that right, or if they assert that they have that right, and you assert that they have not, you two must fight it out between you. I (Mr. Sontar) have nothing to do with that. That, my Lords, certainly seems to me to be what is intended.

Lord Ormidale, I observe, says he cannot think that that is the meaning of it. He says, after quoting the words I have just read, "This cannot, I think, on any fair principle 311] of construction, be *held to mean, as was contended by the defenders, merely to import a reservation of the rentallers' claim to privileges, if they had any." He does not explain why he does not think that is a fair construction. I own it strikes me very much that that was what they really intended to do. He says they might have expressed it more clearly. Perhaps they might. I scarcely know anything that is so expressed that it might not have been put in clearer language; but certainly, if they meant that which Lord Ormidale says they meant, namely, we give this privilege which they assert now exists, I think they might have used clearer language than they have done if that was their meaning. I confess, my Lords, that my own

impression is strongly that the meaning of the words, upon any principle of construction that should be applied, ought to be exactly that which Lord Ormidale thinks it was not. Taking that view of the matter, I think this deed cannot possibly give any new privileges, and consequently there is no ground whatever for maintaining the contention of the appellants founded upon it.

The next deed of conveyance is in exactly similar terms, and carries the matter, therefore, no further. Then comes the lease, which is expressed in words of a different kind altogether; but it is sufficient to say that if the conveyances do not give the privilege, certainly the lease cannot.

LORD WATSON: My Lords, the appellants are the representatives of a body of gentlemen who up to the year 1858 were the beneficial owners of the Queen's Theatre and Opera House in Edinburgh, and of the land upon which it was built. In the year 1858 they sold the subjects to the late Mr. John Brown, a conveyance being granted by the gentlemen who held the property in question in trust as feuars from Heriot's Hospital. The considerations upon which the conveyance was granted were three: First, that the purchaser, the donee, should pay debts owing by the rentalers to the amount of £14,000; secondly, that each of them should be secured in perpetuity an annuity of £2 per annum over the subjects conveyed; and thirdly, that they should have a certain privilege of admission to the then existing theatre, that last stipulation being the one which has given rise to the present contention.

*The annuity was intended to run with the lands, [312 and accordingly it has been effectually made a real burden, but the privilege of admission to the theatre, which was the third consideration, is a right of a description which cannot according to the law of Scotland be made a feudal burden. It is a mere personal right, a right by contract, and if transmitted at all, it must be transmitted by its being made successively a matter of contract with all the subsequent donees who are not the representatives of the original purchaser. It would have been perfectly valid so long as it existed, and was in vigor as against Mr. Brown and as against the representatives of Mr. Brown, but it would not have been of any force whatever against a third party, a purchaser from Mr. Brown or his representatives, unless it was imposed as a personal obligation upon them by the deed of conveyance which they obtained.

My Lords, the circumstances requiring to be noticed further are these: The property has been held successively by

two purchasers who are not the representatives of Mr. Brown.

The theatre, since the deed of 1858 was granted, has been twice destroyed by fire and as often rebuilt. The appellants maintain that the privilege accorded to them by the deed of 1858 is still extant and available to them as against the proprietor of the present theatre, and they maintain alternatively, that even although that obligation had ceased to exist by reason of the destruction of the theatre by fire, still a new obligation to the same effect had been raised by the deeds transmitting the property to the singular successors of Mr. Brown.

My Lords, I do not find that any countenance is given by the learned judges in the court below to the first of these contentions; and it appears to me for the reasons that have already been stated by your Lordships, that it is not well founded. In the first place the obligation is attached to "the said theatre;" it does not extend further, and "the said theatre" when reference is made to the antecedent must be held to be the edifice which was then standing. Further, as a condition burdening land, I think it must be strictly read; and, apart from that rule altogether, I can find nothing in the terms of the deed of 1858 which implies that there was to be either a continuing obligation to maintain a theatre upon the land disposed, or that in the event 313] *of a fire and of a new theatre being built on the site, the disponents should have any right of admission to it. No doubt there is an obligation laid upon Mr. Brown and his representatives not to convert the theatre to any other purpose. No question arises under that clause. Probably Mr. Brown would have been entitled under it to alter the theatre, or to enlarge it without affecting the right of the rental-ers; in fact it might be that he was entitled under that clause to improve the theatre by taking it down and rebuilding it; that would not put a stop to the right of the rental-ers; but that is not the case which arises here. The theatre perished through no act or default on the part of the disponent or his representative, and the question which arises is whether any stipulation is to be found to the effect that the rental-ers shall have access to the new theatre. My Lords, I can find no language in the deed which expresses or indicates such an intention on the part of the two contracting parties.

Then, there being no obligation extant under the deed of 1858, it is next contended that the deeds which have transmitted the feu of the land have also recreated this burden

upon the owners. Now upon turning to the deed of 1874, which is in the same terms as the subsequent transmissions, what I find there is that Mr. Soutar in parting with this portion of the trust estate which was held by him, desired to impose upon the disponent under that deed all the obligations to which he or his author, Mr. Brown, could possibly have been subject under the deed of 1858; and accordingly the conveyance is expressly made subject to all the burdens, conditions, and declarations which are contained in that deed. If the deed had stopped there it could not have been contended that any greater burden was imposed than that which was to be found existing under the conditions of the deed of 1858. But then it is said that the particular words which follow have the effect of creating a new right, and these words are "to allow those parties the privileges to which they are entitled." These words, it is necessary to observe, are not inserted as a new burden or a new stipulation, but are only inserted as a particular explanation of certain conditions and declarations in the deed of 1858. I cannot read them, therefore, as meaning anything else than this: to allow to those parties the privileges to which they are entitled *by the deed of 1858. I cannot read them [314 as implying that the parties are to be allowed to enjoy privileges which are not accorded to them by the terms of the deed of 1858. And that, my Lords, appears to me, as your Lordships have held, to be quite sufficient for the decision of this appeal.

I would only desire to say further that the opinion of the two learned Lords of the Court of Session who took a different view of the case from the majority of the Second Division, appears to have been influenced a good deal by the state of possession which is proved to have existed in this case, the fact, in other words, that from 1865 to 1879, after the theatre referred to in the disposition of 1858 was reduced to ashes, these rentallers had for a period of years enjoyed the right of admission as fully and as freely as if the right had been given to them under the deeds. But, my Lords, it humbly appears to me that these facts as to possession cannot legitimately be taken into consideration in construing the deeds. If the deeds had been defective in any solemnity required by law; if they had been imperfect in execution, these facts might have been founded on as validating the deeds *rei interuentu*; or if there had been any ambiguity such as occurred in regard to the extent of the right of free admission, I think they might have been legitimately referred to, to explain the ambiguity. But when you have deeds like

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these—probative deeds which embody the whole contract and obligations of the parties—it appears to me to be out of the question to refer to possession for the purpose of imposing upon their language a meaning which it does not actually bear.

I therefore concur with your Lordships in the judgment which you propose.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 24th March, 1881.

Agents for appellants: *Simson & Wakeford.*

Agent for respondents: *Andrew Beveridge.*

[6 Appeal Cases, 315.]

H.L. (Sc.), April 7, 1881.

[HOUSE OF LORDS.]

315] *COLTNESS IRON COMPANY, Appellants; BLACK (Assessor of Taxes), Respondent.

Income Tax—Coal Mines—Exhaustion of Pits—Deductions from Gross Profits—Statutes 5 & 6 Vict., c. 35, ss. 100 (Rule 3), and 159; 29 Vict., c. 36, s. 8.

A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working.

See Lord Penzance's opinion as to the method of taxation intended by the Legislature to be applicable to mines.

Knowles v. McAdam (3 Ex. D., 23; 31 Eng. R., 131) held wrongly decided.

[6 Appeal Cases, 340.]

H.L. (Sc.), April 7, 1881.

[HOUSE OF LORDS.]

340] *SINCLAIR, Appellant; CAITHNESS FLAGSTONE QUARRYING COMPANY, Respondents (').

Agreement, Construction of.

Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, *inter alia*, "by the end of the policy" of the landlord: and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, *inter alia*, to give gratuitously the land required for the tramway. Outside the policy ground there

(') Reversing Court Sessions Cases, 4th Series, vol. vii, p. 1117.

was a private road the property of the landlord, which, before it reached the tenant's works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*.

The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that, either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":

Held, reversing the decision of the court below, that under the agreement the stipulation was that the tramway should pass outside the walls which inclose the policy of the landlord; and that by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway.

A landlord entered into an agreement with a tenant, the terms of which were dictated by the landlord to a person who acted as his factor. The agreement was then handed unsigned to the tenant, who was present. The factor's name did not appear in the agreement, nor had he any authority to *make the agreement for the [341] landlord. Subsequently the tenant resiled from the agreement:

Held, affirming the decision of the court below, that the writing was not a valid holograph writ, and therefore the tenant could resile from it.

Lord Watson doubted whether the document would be valid even if the factor had been the sole negotiator acting in the landlord's absence and by his instructions.

APPEAL against an interlocutor pronounced by the First Division of the Court of Session (¹), Scotland, in an action in which the appellant, Sir John George Tollemache Sinclair, was defender, and the respondents, the Caithness Flagstone Quarrying Company, were pursuers. The appellant is proprietor of the Ulbster estates in Caithness, and the respondents are lessees of the pavement quarries of Weydale and Heathfield, and others, and also of pavement yards and buildings at Thurso East, all lying in the parish of Thurso and county of Caithness, on the Ulbster estates, under a lease from the appellant for twenty-one years from 1874.

On the 15th of August, 1879, the respondents raised the action by a summons in which they asked that the appellant ought to be ordained to fulfil his part of an agreement entered into between him and the respondents, dated the 21st of February, 1878; and in particular by giving them the use and possession of land for the completion of a tramway from their quarries to their yard, either (1) "within and by the end of the policy of Thurso Castle," or (2) "in any other place as suitable and convenient for the" respondents in every respect.

The facts of the case and the findings of the court below are very fully given in the opinion of Lord Watson (*post*, p. 460).

(¹) Court Sess. Cas., 4th Series, vol. vii, p. 1117.

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On appeal,

Sir F. Herschell, S.G., and *Mr. Webster*, Q.C., were heard for the appellant.

[They cited *Scottish Lands and Buildings Company v. Shaw*—holograph writing ⁽¹⁾; *Dickson on Evidence*, s. 751.]

Mr. Benjamin, Q.C., and *Mr. Asher*, were heard for the 342] respondents; *but were relieved by the House from arguing the question whether the writing dated the 28th of September, 1878, was a valid holograph writ.

LORD SELBORNE, L.C.: My Lords, it is impossible to regard the litigation in this case without feelings of regret, and I am satisfied that your Lordships ought not, on technical grounds, to abstain now from dealing with it in the way which may appear to you best calculated to put an end to it, by doing substantial justice between the parties. The respondents, who were pursuers in the action, are lessees under the appellant of (what appear to be) valuable and important quarry works, and they have made an expenditure, which must be considerable, in part performance of the agreement out of which the litigation has arisen. The alternative conclusion of their summons, and their first plea in law, are wide enough to enable your Lordships to give them whatever they really ought to have, although they may be wrong in that particular view of their rights for which they have contended, and which they have presented, as if it were the only possible view, in their condescendence. If the form of the allegations in the 5th and 6th articles of the condescendence had been regarded in the Inner House as narrowing and limiting the summons, so as to disable the court from giving effect to the alternative conclusion, except in a sense which practically nullifies it (and which, having regard to the words "in any other place," and "under and subject to the terms of said agreement," I do not myself think it will fairly bear), I have no doubt that a formal amendment of the record, under the act of 1868, ought to have been, and would have been, allowed. The parties had gone into evidence on the whole matter, with reference to every possible view of the effect of the agreement, and the proper mode of performing it. The addition of a few words to the pursuers' statements would have removed all technical objection, without rendering any further evidence really necessary. There is no trace of any such technical objection having been taken before the Inner House; the case was there dealt with on grounds of substance, not of form. My opinion is that your Lordships ought also so to deal with it,

(¹) Court Sess. Cas., 4th Series, vol. vii, p. 756.

in accordance with what I have *always understood [343 to be a principle acted upon here, that objections of a merely formal kind, which do not appear to have been insisted upon, and which would have been remediable, in the court below, ought not to prevail upon appeal.

Upon the merits, both parties have contended for more than they were justly entitled to. The contention of the defender (appellant here), that the agreement of the 21st of February, 1878, was altered by the unsigned proposal of the 28th of September, 1878, and Mr. Gunn's letter of the 21st of October following, is untenable in law, that proposal not being holograph of the defender, in whose name it throughout speaks, and Mr. Logan (whose holograph it is) not having written it under any authority then intrusted to him by the defender to negotiate an agreement on his behalf. But I think it is only just to say, that the blame of the subsequent failure to settle the dispute upon the terms of that proposal does not appear to me to rest exclusively with either party; and, as the costs of the litigation have not been either caused, or substantially increased, by the appellant's contention on this point, I think the case may properly be dealt with, both as to costs and otherwise, without any further reference to it.

Upon the construction of the agreement of the 21st of February, 1878, I think that the respondents are wrong.

The material facts, with reference to which that agreement ought to be construed, are the following: The respondents are lessees from the appellant, Sir Tollemache Sinclair, for the residue of a term of twenty-one years, commencing at Martinmas, 1874, of the Weydale and other quarries, and of a piece of ground, with buildings thereon, occupied and used by them for the purpose of their pavement works, at Thurso East. Their quarries are at a considerable distance to the south from these pavement works. The whole of the land between the quarries and the end of the policy or homegrounds of Thurso Castle, where the appellant resides, belongs to the appellant, being in the occupation of his agricultural tenants, who were bound by their contracts to give up to him, for a suitable compensation, such part of the lands occupied by them as he might require for roads.

These lands are separated from the castle policy by the public turnpike road leading from Thurso to Wick, and the policy itself runs down to a *sharp angle, point, or [344 end, to the south-west, abutting upon this public road. The agricultural land, already mentioned, lies on the other side, to the south. The soil of the turnpike road is vested

in the appellant, subject to the rights of the public, and to the powers of the road trustees. The policy is bounded westward by a park wall, on the western side of which there is an occupation road, diverging from the turnpike road at the exact point where the policy ends, and proceeding thence northwards. This occupation road is itself bounded to the west, for some distance from its junction with the turnpike road, by a public park, not the property of the appellant; and afterwards, for some distance further, by the shore of the Thurso estuary, which does belong to the appellant. Along this it continues to run, close to and in a line with the policy wall, until it reaches a parcel of land, lying between the policy and the estuary, which is also a part of the appellant's estate, but is leased by him as a pavement yard to another company, called "The Co-operative Pavement Manufacturing Company at Thurso," for a term of eleven years, commencing at Whitsuntide, 1872. The same occupation road is continued northward, through this parcel of land, until it passes into the respondents' pavement works at Thurso East, where it terminates. The soil of this occupation road belongs throughout to the appellant. The co-operative company are bound, by their contract with him, to keep it, where it passes through their pavement yard, free from obstructions, "so as to admit of full and free access to and from Thurso East, at all times during the currency of their lease." The respondents are, by the terms of their lease, entitled to use it; and they are bound to bear two-thirds of the expense of keeping it in repair, through the whole of its course from the turnpike road to Thurso East, the other third being borne by the appellant. They have, in fact, been in the habit of carrying along it, in wagons and trucks, all the stone brought from their quarries to their pavement works; and it appears from the evidence that in or about 1870 there was a "stone tramway" laid down upon it, which "continued to be used till the stones got so much worn that they became useless." Whether the *solum* of this road, where it passes through the yard of the co-operative company, is included in that 345] company's lease, *is not, upon the evidence, clear; but the more probable inference from that evidence seems to me to be that it is not.

The distance northwards from the southern angle, point, or end of the castle policy, to the nearest part of the respondents' pavement works at Thurso East, is more than one third of the whole extent of the policy grounds, measured in a straight line from south-west to north-east.

It appears, from the evidence of the witnesses for the appellant, that there would be no practical difficulty in carrying a tramway or railway (in continuation of that already made by the respondents from the Weydale quarry, under the agreement of the 21st of February, 1878, to a point near, and a little to the south-west of, the end or southern angle of the castle policy), along the occupation road, without interfering with any use of it, for access or egress to or from their pavement yard, to which the co-operative company may be entitled. It is stated to be about twenty-five feet in breadth in its narrowest part, and, at its widest, twenty-nine feet, of which (according to the evidence of the witness Belfrage, which I see no reason to disbelieve) ten feet only would be required for the width of the tramway and the trucks passing along it; seventeen feet of roadway remaining available, at the same time, for other traffic.

The agreement, which your Lordships have to construe with reference to this state of facts, provided that the respondents should "construct a tramway or railway from the Old Weydale Quarry, by the Moss of Weydale, thence near Stainland House, near Oldfield House, and by the end of the policy of Thurso Castle, to their works at Thurso East." The Moss of Weydale, Stainland House, and Oldfield House were all in that part of the appellant's estate, which was let to his agricultural tenants, to the south of the turnpike road. Neither the turnpike road nor the occupation road is mentioned in the agreement; but the former must necessarily be crossed by the intended tramway or railway. The respondents further agreed "to compensate the tenants along the line for any damage done to their farms during the currency of their leases." The appellant agreed "to give gratuitously the land required for said tramway or railway." There were also stipulations, which need not be stated in detail, as to a contribution *by [346 the appellant towards the maintenance of the road, when made; as to payment of one-half of the value of the tramway by the appellant to the respondents, in the event of his letting the Weydale quarries to any other person, or taking them into his own hands at the end of the respondents' term; and as to a right given to the respondents to sell the materials of the tramway in certain other events. The agreement concluded with these words: "The direction of the line to be adjusted between Mr. Logan and the company,"—Mr. Logan being the appellant's man of business.

The principal contest has been upon the meaning of the words "by the end of the policy of Thurso Castle;" the

respondents insisting that, as the appellant was "to give gratuitously" all the land required for the tramway, and as the tramway was to be carried as far as the respondents' works at Thurso East, it must be carried up to those works from the turnpike road through the policy itself, where no other rights or claims of right than those of the appellant could possibly come in question. This would have involved a passage, not through any small corner of the policy which could reasonably be described as its "end," but through more than one-third of its entire length; and it appears to me that a construction which could have such an effect would do extreme violence to the natural meaning of the words. If those words had been "by the policy" they might possibly have meant *by way of* the policy; as "by the Moss of Weydale" meant by way of, or through, the Moss. But "by the end" naturally means that the tramway was to pass by, and to be carried on the outside of, that angle or point, in which (as has been stated) the policy ends. It cannot have been intended to exclude from the line of the tramway everything in the nature of an existing roadway over which other persons besides the appellant and the respondents might have some rights of passage or traffic; because it was, at all events, absolutely necessary that the tramway should, at some point, cross the turnpike road. If, at that point, the agreement on the appellant's part might be performed by giving gratuitously to the respondents all his right to that part of the *solum* of the turnpike road, leaving them to make their own terms with the turnpike trustees, still more might it be performed by giving up to 347] *them, for the like purpose, as much as might be necessary of the *solum* of the occupation road, or of the sea-shore in which, subject to their own right of way, and to the rights (whatever they might be) of the co-operative company, the appellant had the absolute property. If, indeed, there had been no land belonging to the appellant which he could gratuitously give to the respondents, westward of the policy wall; if it had been apparent, from the facts, that the parties could not have had in their contemplation any mode of carrying the tramway from the turnpike road to the respondents' pavement works, except through the policy; it might then have been necessary to interpret the words, "by the end of the policy," in a sense different from their natural and *prima facie* construction; but the facts being such as they actually are, and having been within the knowledge of both parties at the date of the agreement, I think the natural construction of those words must prevail. There was no

legal or other impediment to the construction of the tramway along the course of the occupation road (whether with or without any deviation where the road skirts the seashore) up to the point where the occupation road enters the pavement yard of the co-operative company; and I think it probable, upon the evidence (though in the absence of the co-operative company it cannot be so decided), that the tramway might lawfully be carried, by the concurrence of the appellant and the respondents, along the course of the same road, through the co-operative company's yard. Supposing, however, that it might be necessary for the respondents during the residue of the co-operative company's lease, to obtain the consent of, or make some terms with, that company (as they would be obliged to do with the turnpike trustees), I think they must be regarded as having entered into the agreement with sufficient knowledge of that possible liability, and without any engagement on the part of the appellant either to indemnify them from it or (if any difficulty should arise out of it) to let them carry the tramway through the Castle policy. I do not think that the possibility of such a difficulty arising could constitute a reason for interpreting the words "by the end of the policy" in any other than their natural sense. What happened afterwards cannot be *used in aid of the construction [348 of those words. It is, however, satisfactory to know that the position in which the respondents will be placed by holding them to the natural construction of the agreement is not different (so far as the passage through the yard of the co-operative company is concerned) from that in which they would have been placed by the arrangement to which they, through Mr. Gunn, were willing to consent on the 21st of October, 1878, if that arrangement had been carried into effect. By the proposal, of which Mr. Gunn then signed his acceptance, they would have acquired a right to carry the tramway along a narrow strip of land now lying within the policy wall (which was to have been taken down and rebuilt on the east side of the tramway), up to the point where the occupation road enters the yard of the co-operative company, but no further. It would have been just as necessary under that proposal as under the agreement of the 21st of February, to continue the tramway along the course of the occupation road through the co-operative company's yard in order to reach its intended terminus in the respondents' works at Thurso East.

Taking this view of the rights of the parties, it appears to me that the declarations contained in the interlocutor of the

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First Division, now appealed from, are less favorable than they ought to have been to the appellant; and that the appellant ought not to have been required to state in a minute in what line he proposes that the portion of the tramway therein mentioned shall be formed, and what ground he proposes to furnish for that purpose. I think, therefore, that the interlocutor appealed from ought to be reversed, except so far as it recalls the interlocutor of the Lord Ordinary. I have had an opportunity of seeing the terms of the order, which one of my noble and learned friends, who is peculiarly conversant with the administration of justice in Scotland, proposes to substitute for it; and, agreeing as I do with the form of order which he suggests, I recommend to your Lordships that it should be adopted. I am also quite content that the costs of that appeal, and below, should be disposed of (as my noble and learned friend proposes) by giving them to the appellant, who has succeeded upon the substantial question raised in the respondents' condescendence.

349] *LORD BLACKBURN: My Lords, this case comes before your Lordships in a manner which has given me some anxiety. My difficulty has principally been that I doubted whether it was competent, on this state of the proof, to decide a question which has not yet arisen, and may probably never arise, namely, what were the obligations which, by the agreement of the 21st of February, 1878, the defender took upon himself, in case the co-operative society should raise an objection to the tramway being laid along the private road running through their yard. It was for some time supposed by both parties that they were bound by the substituted agreement of September-October, 1878. I agree with and need not repeat the reasons for saying that this substituted agreement was one from which either of the parties could resile, and when either did so resile the parties were remitted to their rights under the agreement of February, 1878, that agreement having been so acted upon that neither party could resile from it.

But for some months both parties were under the belief that they were bound by this substituted agreement. According to it the line was to run along the west end of the policy, and then across the co-operative company's yard above the road. The co-operative society were under no obligation to assent to this line crossing what was unquestionably their yard, and it appears from a document, No. 102 of process, that they asked for an apparently unreasonable concession as the consideration of their assent. Whether they would have persevered in this demand we cannot tell,

for the pursuers were dissatisfied with the agreement of September–October on other grounds, and being advised, and rightly advised, that they could (in point of law) resile from that agreement, they did so; and then the parties were remitted to their rights under the agreement of the 21st of February.

The co-operative society never were asked if they had any objection to rails being laid on the private road, and consequently never objected to it. And it by no means follows that because they asked for an unreasonable concession in return for their assent when they had a clear right, reason or none, to refuse their assent, they should object where their right to object, unless they *showed some dam- [350 age to themselves, would be, to say the least, very doubtful.

I doubted whether it was not premature to decide this question; but I agree that we cannot enable the parties to dispose of the whole matter really in controversy without having recourse to a new action, unless we do decide this question. And, having had the advantage of reading and considering the opinion of my noble and learned friend opposite (Lord Watson) I am satisfied that we both can, and ought to decide it.

I think it will be convenient now to read the document on the construction of which I think everything depends. [His Lordship then read the agreement of the 21st of February, 1878, which will be found in Lord Watson's opinion, *post*, p. 469.]

I think that the words "by the end of the policy of Thurso Castle," in their primary and natural sense, mean skirting the policy outside the end of it, but I do not think they are so express as necessarily to mean nothing else. And if the state of things with relation to which the agreement was made had been known to both parties to be such that no tramway could practically have been made outside the park wall and between it and the river, so that no tramway could have been made to the company's works at Thurso East without going across the policy, I think that the words might have been construed in a secondary sense as meaning that the line was to go across the policy near its end. But this is not the case. The private road of Sir Tollemache, which is used as a cart road by the pursuers, is a line along which a tramway might very well be laid. It is suggested that the co-operative company might object to rails being laid along the road where it passes between the two portions of land occupied by them as a pavement yard. It is, I think, a mistake of fact to say that they have objected. And in

common with all the judges below, I do not see on what ground they could object. But even if they had a right to object, and exercised that right, that would not, as I think, be an admissible ground for construing the agreement of the 21st of February, 1878. It would raise the question, whether under this agreement Sir Tollemache did more than agree to allow the pursuers to take this road for the purpose of laying the tramway on it without making any charge for it, 351] leaving it to them *to overcome the objections of the co-operative company if they were unfounded, or, if the co-operative company were able to show that they had a valid ground of objection, whether Sir Tollemache was bound to make compensation in damages for having promised more than he could perform.

I have, not without hesitation, come to the conclusion that it is necessary to decide this; and I think, therein agreeing with Lord Shand and the Lord Ordinary, that all that the defender bound himself to do was to give the pursuers such rights in the ground as belonged to him, and allow them to use such rights for the purpose of forming the line and overcoming any opposition that might be offered to it, making no charge for so doing. But I do not think that the agreement involves any engagement on the part of the defender to indemnify them against such opposition, or, in the improbable event of its being well founded, to allow the pursuers to carry the line across the policy.

I should have come to this conclusion on the words, and from the nature of the agreement, but the express stipulation as to making compensation to the tenants along the line for any damage done to their farms during the currency of their leases strongly confirms that view. It was known to both parties that the defender had reserved in his leases a right to take possession of such part of their farms as was needed for the purpose of making roads across them, making compensation; and I think that they agreed that the pursuers should exactly stand in his shoes in that respect. And this, I think, throws light upon the intention of the parties as to what was to be done in regard to the road through the co-operative company's yard.

I think that this was not the view taken by the Lord President, Lord Deas, and Lord Mure, and I think that, construing the interlocutor appealed against by the aid of what they said, the finding in it that the defender is "bound to furnish gratuitously the ground necessary for the formation," &c., must be, or at least may be, read as deciding this question against the defender. It is the only point in

which I think their interlocutor wrong, but I think it is wrong in that, and that it should be altered in the manner proposed by Lord Watson.

I agree that the defender below was justified in coming to this *House to get rid of this interlocutor, and [352 though he, no doubt, was also desirous of setting up the substituted agreement of September–October, 1878, and was wrong in that, I think he should be allowed his expenses of the appeal, as well as those in the court below.

LORD WATSON: My Lords, the respondent company are tenants of the slate and pavement quarries of Weydale, Heathfield, and others, in the parish of Thurso and county of Caithness, under a lease from the appellant for a period of twenty-one years, ending on the 11th of November, 1895. The subjects let to the company include a yard at Thurso East, lying on the west side of the policy of Thurso Castle, between the policy wall and the Thurso River, in which the rough material from the quarries is dressed and prepared for market. Down to the year 1878, the undressed stones were carted from the quarries, which are situated about three miles to the south-east of the yard.

On the 21st of February, 1878, an informal written agreement was entered into between the appellant and the company, by which the latter undertook to construct “a tramway or railway from the Old Weydale Quarry by the Moss of Weydale, thence near Stainland House, near Oldfield House, and by the end of the policy of Thurso Castle to their works at Thurso East.” The company agreed to compensate the tenants along the line for any damage done to their farms during the currency of their leases, and the appellant, on the other hand, agreed to “give gratuitously the land required for the said tramway or railway.” It was also arranged that the direction of the line should be adjusted between Mr. Logan, the appellant’s factor and the company. The agreement, though improbable, has been validated *rei interventus*. The route from the Old Weydale Quarry northward, till it approaches the county road leading from Wick to Thurso via Castletown, was amicably adjusted in July, 1878. The county road runs along the wall which bounds the policy of Thurso Castle on the south-east; and a private road, belonging to the appellant, branches off from it, at the southernmost corner of the policy, and leads straight north, running for some distance along the west wall of the policy, after which it intersects a pavement yard leased by the appellant*to the Caithness Co-operative Company, and then enters the yard of the respondent

company, from which there are accesses to the offices of Thurso Castle. The line of tramway, so far as adjusted in July, 1878, was shortly thereafter constructed; and, pending the disputes which have arisen as to its further course, it has been extended up to the south-eastern margin of the county road. From the quarries to that point stone and slates are carried by means of the tramway, and are thence conveyed to the yard in carts along the private road. That road has all along been used by the respondents for cartages to and from their yard at Thurso East; and, by terms of their lease, they are under obligation to pay two thirds of the cost of maintaining it in a good and sufficient state of repair.

The respondents, in July, 1878, proposed that the tramway, after crossing the county road, should enter the policy a little way to the east of its southmost corner, and should thence proceed northward through the policy until it reached their yard; and the precise line which they proposed to follow was marked out, and submitted to Mr. Logan for his consideration. The respondents allege that Mr. Logan did actually agree to and adjust with them the line thus indicated; but they have failed to prove the allegation, and it is certain that the appellant objected, and has ever since disputed the right of the respondents to construct any portion of the tramway within the policy, under the agreement of the 21st of February, 1878.

The action, in which the present appeal is taken, was not raised by the respondents,—for reasons which will shortly appear,—until the 15th of August, 1879. It concludes that the appellant be ordained to give them the use and possession of land for the purpose of completing the tramway, and that either (1), “within and by the end of the policy of Thurso Castle,” or (2), “in any other place as suitable and convenient for the pursuers in every respect.” The second of these conclusions is wide enough to cover every possible line of access to the respondents’ yard, other than a line “within and by the end” of the policy, and is therefore sufficient to include any line outside the policy. The action is laid upon the agreement of February, 1878, and the respondents first allege that, in July of that year, Mr. Logan, 354] acting *for the appellant, finally adjusted and settled with them the line then staked out through the policy in terms of the agreement libelled on, and failing that, they allege right to have some other equally convenient route. The terms of the 6th article of their revised concordance not only make it clear that, before bringing the appellant

into court, they insisted upon a route within the policy, but very strongly suggest that it was their intention, under the alternative conclusion of the summons, to demand no other route. Their main contention has been that they are entitled, under the agreement in question, to pass through the policy, and, in support of that claim, they aver (cond. 5) that "there is no route outside the policies of Thurso Castle over which the said proposed tramway, as described in the agreement, could be constructed to the pursuers' works, or along which the defender could gratuitously give the pursuers land on which to lay the said tramway. Immediately outside the said policies there is a road which occupies the whole available space for a tramway between the policies and the shore of Thurso River, and the ground occupied by the Co-operative Pavement Company, over which the defender can give no right to make a tramway, intercepts all communication between the pursuers' works and the point where the tramway line, so far as already constructed, ends, unless the tramway be led through the policy of Thurso Castle the whole way from the said public road between Thurso and Wick to the pursuers' works." I do not think these averments were intended to convey the idea that the formation of a tramway along the private road, all the way from the county road to the respondents' works, is a physical impossibility. What, in my opinion, the respondents thereby meant to assert, and do assert, is that the appellant was not in a position to give them an absolute right to form the tramway upon that part of the road which intersects the yard of the co-operative company,—that the appellant was bound, under the agreement of February, 1878, to give them an absolute right to ground for the tramway, free of all claims at the instance of third parties,—and that, being unable to fulfil that obligation, by giving a route through the co-operative company's yard, he must implement it by giving a route through his policy.

The appellant meets these allegations with a general denial, *and the only substantive defence which he sets [355 up is founded on two missives, dated respectively the 28th of September and the 21st of October, 1878, by which, he maintains, a valid agreement was constituted, binding the company, subject to the provisions therein made in his favor, to take a strip of the policy ground twenty feet in breadth, along the east side of the private road, for the formation of their tramway. The following is the history of those two missives. At a meeting which took place on the 28th of September, between the appellant, his factor, and

several members of the respondent company, an offer was written by Mr. Logan, to the appellant's dictation, by which, in consideration of certain alterations to be made upon the conditions of the respondents' lease, the appellant undertook to give them the said strip of ground, provided they took down the policy wall and rebuilt it on the east side of the tramway. That writing was handed, unsigned, to the members of the company present by the appellant, and the offer therein contained was formally accepted, by a holograph letter, written and subscribed by the managing partner of the company, dated the 21st of October, 1878.

I think the Lord President is under a misapprehension when he says that the contract embodied in these two mis-sives "was no sooner agreed to than the parties differed as to what it meant." On the contrary, whilst both parties acted on the footing that the contract was binding until June, 1879, I can find no trace of any difference having arisen as to its meaning before the month of May, 1879. It appears to have been assumed on both sides that the execution of another deed was necessary in order to give effect to the provisions of the contract, and accordingly, on the 29th of October, 1878, a deed of agreement, in duplicate, subscribed by the appellant, was sent by Mr. Logan to the respondents for their signature, with a request that one of the duplicates should be returned to him, to be put up with the principal lease. So far from objecting to the terms of the deed, the managing partner of the respondent company, on the 31st of October, informed Mr. Logan by letter that it could not be signed by all the partners owing to the absence of one of them, and a month afterwards he wrote to Mr. Logan that, in consequence of the continued absence of that
356] partner, he could not yet send the signed *deed, but would do so as soon as possible. It does, however, appear that in May 1879, some objection was taken by the respondents to the terms of the agreement, whereupon a minute was substituted for it, which was sent in draft to the respondents on the 19th of May, by the appellant's solicitors. On the 31st of May the respondents wrote that they had not been able to finish the revisal of the draft minute, but hoped to be able to do so in a day or two. The objections which they ultimately stated to the terms of the minute were confined to one clause, providing "that the tenants shall have liberty to occupy the said strip of ground for a tramway only, and that until the expiry of the said lease at the term of Martinmas, 1895, and no longer." They apparently asserted their right to use the strip in question in perpetuity,

and that not only for tramway purposes, but as storage ground. Mr. Logan, on the 9th of June, 1879, refused to concede that right, and refused to give them possession of the ground until the clause was adjusted, either amicably or by a court of law. In reply to that communication, the respondents on the 17th of June, intimated that they resiled from the contract of September and October, and reverted to their rights under the agreement of February, 1878; and they at the same time requested Mr. Logan to point out the route along which their tramway was to be laid in terms of that agreement. I observe that two of the learned judges of the First Division regard the words of the disputed clause as additional to and constructive of the contract, and hold that the respondents were ready to adopt, in the minute proposed, the *ipsissima verba* of the contract, and that Mr. Logan was wrong in insisting that words should be inserted which were not in the original writing. I am unable to concur in that view, because it is based on the assumption that the whole terms of the contract were to be found in the appellant's unsigned offer of the 28th of September, and ignores the fact that, in the respondents' acceptance, which is *pars contractus*, the strip of land in question is described by them as "tramway route added to our present lease."

From the time when they first intimated their departure from the September-October agreement, the respondents have persistently claimed either the route staked out by them in July, 1878, or some other equally convenient route through the policy *of Thurso Castle. On the other [357 hand, the appellant has, with no less persistency, maintained that the respondents are still bound by the agreement of September-October, and that they must, subject to its conditions, take the strip of land therein specified. In their eagerness to make good these respective contentions, the parties seem to have lost sight of the possible alternative of the respondents being only entitled, under the agreement of February, to complete their tramway along a line outside the policy. But the case, as presented to the House, affords ample materials for disposing of that alternative, which is certainly within the conclusions of the summons. The respondents' allegations, which I have already quoted, negating the possibility of any route without the policy, and the appellant's denial of them, have been supported by proof; and they appear to me directly to raise these two questions,—(1), whether, by the agreement of February, the appellant is under an absolute obligation to provide the

ground necessary for the formation of the tramway; and (2), whether there is any possible route outside the policy.

I shall now advert to the manner in which the case has been dealt with in the court below.

The Lord Ordinary (Lord Rutherford Clark) assoilzied the appellant from the conclusions of the summons; and the grounds of his judgment are given in the opinion which his Lordship delivered when advising the cause. The learned judge did not think it necessary to dispose of the appellant's defence, founded on the agreement of September and October, 1878. He held that the respondents' case failed, because, according to the just construction of the agreement of February, upon which it was laid, the tramway was to be constructed not within but without the policy, and the appellant merely assented, so far as his rights and interests were concerned, to the respondents making a tramway, and did not undertake to find them the means of making it.

The Lords of the First Division recalled the Lord Ordinary's judgment, and found (1st), that under the agreement of February the respondents are entitled and bound to construct the tramway therein mentioned; and (2d), that the defender, on the other hand, is bound to "furnish" the ground necessary for the formation of the tramway through-358] out its whole length, and, in particular, "the ground necessary for the formation of that portion hitherto unformed; and, with these findings, they appointed the appellant "to state in a minute in what line he proposes that this portion of the tramway shall be formed, and what ground he proposes to 'furnish' for that purpose." The proposition affirmed by the first of these findings does not appear to have been disputed by either of the parties. In the second the words "furnish gratuitously," were introduced for the purpose of construing, in accordance with the opinions of the majority of the judges, the expression "give gratuitously," which occurs in the agreement, as implying an obligation on the appellant to give land for the tramway, unincumbered by the rights or interests of any third parties.

The majority consisted of the Lord President, Lord Deas, and Lord Mure. The Lord President said,—“Sir Tolle-mache Sinclair is under an obligation to find a way for this tramway to go from the public road up to the works at Thurso East; and it will be for him to consider in what way he can best fulfil that obligation.” Lord Deas was of opinion that the difficulty of carrying the tramway through

the works of the co-operative company was a "difficulty which must be overcome by the landlord;" whilst Lord Mure held the deed of February, 1878, to be "an agreement binding Sir Tollemache Sinclair to find ground for the use of that company for the purposes of the tramway to be made to their works." Their Lordships were of opinion that, according to their primary meaning, the words "by the end of the policy" indicated a line of tramway without the policy; but it is my impression that, in the event of the appellant being unable or unwilling to furnish a line through the co-operative company's yard, their Lordships would have construed these words as imposing upon him an obligation to give a route through his policy. Upon this point the Lord President said,—“But while I construe the agreement in his favor as not imposing upon him an absolute obligation to permit the tramway to go through his policy, I think it does impose upon him an obligation to do what is necessary on his part to enable the pursuers to fulfil their obligation to him, to construct the tramway from one of its termini to the other.” Their Lordships were unanimously of opinion that the agreement *of Septem- [359 ber–October was improbativ, and that no *rei interventus* having followed, the respondents were entitled to resile from it in June, 1879. Lord Shand differed from his three brethren as to the construction of the contract, holding with the Lord Ordinary that, under the agreement of February, the line of tramway was not to be within the policy, and that the appellant only undertook to give such right to the land required as he was possessed of.

Upon the assumption that the agreement of February, 1878, was rightly construed by the judges of the majority, I should be of opinion that they did right in appointing the appellant to lodge a minute stating what ground he proposed to furnish. If the appellant, in obedience to that order, had judicially stated that he was able and willing to secure to the respondents the right to lay their tramway along the private road, including that portion of it which passes through the yard of the co-operative company, I see no reason to doubt that the court would have proceeded, failing the agreement of parties, to settle the line of tramway along that road. On the other hand, if the appellant had lodged a minute setting forth that he was willing, so far as his rights were concerned, to permit the tramway to be formed along the private road, but declined to make any arrangement with the co-operative company, I think the

court would have compelled him to give ground within his policy.

I am of opinion, with all the judges of the First Division, that the missive of the 28th of September, 1878, is not a valid holograph writ. I do not doubt that a missive written and signed by a factor or agent, professing to bind his principal, is a probative holograph writ according to the law of Scotland; and that, when duly accepted, it will bind the principal if he gave authority, and will subject the writer in damages, if he did not. It appears to me, however, to be sufficient for the decision of this point that Mr. Logan, who wrote the document, was not, in any sense, a party to the negotiations on the 28th of September, which resulted in its delivery to the respondents, for their consideration and acceptance. These negotiations were conducted by the appellant in person, and it does not appear from the evidence that Mr. Logan ever had, or supposed he had, any authority from the appellant to make such an offer. Even if Mr. Logan had *been the sole negotiator, acting in the appellant's absence, and by his instructions, I doubt whether the writing would have been thereby validated. The general rule of the law of Scotland is that a holograph writing, in order to be effectual, must be subscribed by the writer. In the absence of subscription equivalents have been admitted, such as a reference to the document in a subsequent holograph and subscribed writing by the same person, or the occurrence of the writer's name in the body of the unsigned writing. In the present case there is no such subsequent writ, and the name which does occur in the writing itself, as that of the offerer, is unfortunately not the name of the writer. The appellant's allegations of *rei interventus* are so palpably irrelevant that I do not think it necessary to make any further reference to them.

But I cannot agree with the construction which has been put by the Lord President and by Lords Deas and Mure upon the agreement of February, 1878. The primary meaning of the expression, "by the end of the policy," certainly is that the line shall be carried without the policy. No doubt "by" is a flexible word, and its meaning may vary with the context. It may signify "by means of," as in the expression "going by a road." Or it may mean "through," as when one speaks of going "by a field" to a point which is on the other side of it. But, *a priori*, the presumption is that a gentleman who stipulates that a tramway shall be carried "by the end" of his policy, does not intend that it shall go through his policy. And that such was not the

intention of the parties to the agreement of February becomes the more apparent on referring to the Ordnance sheet, which is incorporated with the conclusions of the action. The policy of Thurso Castle comes to a very narrow point at its southmost corner or extremity, where the private road to the respondents' yard strikes off from the country road. That southmost corner is plainly what the parties intended to designate by the expression "the end of the policy," and even if the word "by" were read as "through," it appears to me that no route could, in any reasonable sense, be described as "through the end of the policy," which did not lead from the county road to the private road. The line of tramway which the respondents claim is a line running, not *through the end of the policy, but through the policy [361] itself. I accordingly concur with Lord Rutherford Clark and Lord Shand, in holding that, under the agreement libelled, the stipulation of the parties is that the tramway shall pass outside the walls which inclose the policy of Thurso Castle.

I am also of opinion that, by agreeing to "give gratuitously" the land required for the tramway, the appellant merely undertook to give the respondents such right as was vested in him, leaving them to settle with any persons who might have a right or interest entitling them to object to the formation of a tramway. It appears to me that these words, according to their natural import, do not mean that the appellant shall purchase or procure the interests of third parties in the ground to be occupied by the tramway, for the benefit of the respondents, but that he shall permit the respondents to use his rights in the *solum* without making any charge therefor; and I am unable to find, either in the terms of the agreement, or in the circumstances of the case, aught that compels me to attach to the words any other than their natural meaning. The evidence shows that, practically, the only route from the county road to the respondents' yard, without the policy of Thurso Castle, is along the private road already described; and the only obstacle to laying the tramway along that road which the respondents have suggested is, that the co-operative company may refuse to allow its being laid along that portion of the private road which intersects their works. Although there are no *termini habiles* for deciding the point, in the absence of the co-operative company, I can see no reasonable ground for holding that the company could successfully resist the continuation of the tramway to the respondents' works, and there is no evidence that they have attempted or intend to

offer any resistance. The terms upon which they proposed to allow the tramway to be made through their works, had no reference to its construction along the road, but upon the *solum* of the yard, exclusively occupied by them, and that was an operation which they had an undoubted right to prevent. I do not think it ever occurred to the parties, when they contracted in February, 1878, that any difficulty would be raised by the co-operative company, and I am confirmed 362] in that impression by the fact that the *respondents subsequently negotiated with the appellant on the footing that the strip of land, which he was to give for the formation of the tramway, should terminate at the yard of the co-operative company. Of course the appellant must not only give the respondents such rights as he has, but must also allow them to use his name in any proceedings which may become necessary for the vindication of these rights.

For these reasons, I am of opinion that the appellant is entitled to decree of *absolvitor* from the conclusions of the action, so far as these conclude that he shall be ordained to give the possession and use of any part of his policy for the formation of a tramway. The 6th article of the revised concordance for the respondents is so framed that the court below might have difficulty, owing to the present shape of the record, in adjusting a line of tramway without the policy by a decree under the conclusions of the summons. But that difficulty may be removed by a very slight amendment of the record; and it is plainly for the interest of both parties that the whole matter in dispute between them should be disposed of without resort being had to a new action. I therefore think your Lordships ought to reverse the interlocutor appealed against, except in so far as it recalls the Lord Ordinary's interlocutor of the 27th of February, 1880; to declare that the appellant is entitled to *absolvitor* from the first alternative conclusion of the summons, and also from the second alternative conclusion, in so far as the same relates to the possession and use of land within the policy of Thurso Castle, and that, under the agreement of the 21st of February, 1878, the appellant is not bound to give to the respondents any rights in the ground required for the completion of the tramway, except such rights as belonged to him, he being always bound to allow the respondents to use his name in any proceedings they may be advised to take for the vindication of these rights; and subject to these declarations, to remit the cause to the First Division of the Court of Session, with directions to dispose of the second alternative conclusion of the summons, in so far as the same

relates to the possession and use of land without the policy of Thurso Castle, and to allow the parties to make such amendments of the record as may be necessary for that purpose. And, seeing that the appellant *has succeeded [363 in his resistance to the demands of the respondents for a line through his policy, and that he was justified in coming to this House, in order to get rid of the finding pronounced by the First Division, I think he ought to have the costs of the appeal and his expenses in the court below.

Ordered and adjudged:—That the said interlocutor of the Lords of Session in Scotland, of the First Division, of the 9th of July, 1880, complained of in the said appeal, be and the same is hereby reversed, except in so far as it recalls the interlocutor of the Lord Ordinary of the 27th of February, 1880: And it is *Declared*, That the appellant is entitled to *absolvitor* from the first alternative conclusion of the summons, and also from the second alternative conclusion in so far as the same relates to the possession and use of land within the policy of Thurso Castle, and that under the agreement of the 21st of February, 1878, the appellant is not bound to give to the respondents any rights in the ground required for the completion of the tramway, except such rights as belonged to him, he being always bound to allow the respondents to use his name in any proceedings they may be advised to take for the vindication of their rights; and subject to these declarations, it is *Ordered*, That the cause be and the same is hereby remitted to the First Division of the Court of Session in Scotland, with directions to dispose of the second alternative conclusion of the summons in so far as the same relates to the possession and use of land without the policy of Thurso Castle, and to allow the parties to make such amendments of the record as may be necessary for that purpose: And it is further *Ordered*, That the respondents do pay or cause to be paid to the said appellant the costs incurred by him in respect of the said appeal to this House, and also his expenses in the court below, &c.

Lords' Journals, 7th April, 1881.

Agents for appellant: *Simson & Wakeford*.

Agent for respondents: *W. A. Loch*.

[6 Appeal Cases, 364.]

J.C.*, February 3, 4, 1881.

[PRIVY COUNCIL.]

364] *SASTRY VELAIDER ARONEGARY and his Wife, *Plaintiffs*; and SEMBECUTTY VAIGALIE and Others, *Defendants*.

ON APPEAL FROM THE SUPREME COURT AT CEYLON.

Law of Ceylon—Presumption of Marriage—Onus Probandi.

According to the Roman-Dutch law there is a presumption in favor of marriage rather than of concubinage.

According to the law of Ceylon, as in England, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

Where it is proved that they have gone through a form of marriage, and thereby shown an intention to be married, *held*, that those who claim by virtue of the marriage are bound to prove that all necessary ceremonies have been performed.

APPEAL from two judgments of the Supreme Court (Feb. 12, and July 26, 1878), reversing a decision of the District Court of Batticaloa (Aug. 5, 1876).

The facts are stated in the judgment of their Lordships. The issue was whether the appellants had sufficiently proved a valid marriage alleged by them.

Mr. *Gorst*, Q.C., and Mr. *E. W. Stock*, for the appellants, contended that the Supreme Court had wrongly entertained a presumption contrary to marriage, and had wrongly thrown on the appellants the burden of proving what were the necessary ceremonies, and that they had been duly performed. The appellants had proved consent, intention to contract marriage, subsequent belief that they had done so. It rested with the respondents to prove distinctly and conclusively what the necessary rites were, and that they had **365]** not been at any time performed. Reference *was made to *De Thoren v. Attorney-General* ('); *Piers v. Piers* ('); *Lyle v. Ellwood* (').

Dr. *Phillimore*, and Mr. *Dunham*, for the respondents, contended that the rule as to *onus probandi* asserted on the other side was established by Scotch authorities, and was not found in Roman-Dutch law. They referred to Van

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

(1) 1 App. Cas., 686; 17 Eng. R., 72.

(2) 2 H. L. C., 331.

(3) Law Rep., 19 Eq., 98; 11 Eng. R.,

Leeuwen [ed. 1820], p. 71; Grotius, Introduction to Dutch Law, p. 24, sect. 16; John Voet, book xxiii, tit. ii, of Pandects; Thompson's Laws of Ceylon, vol. ii, pp. 564, 565.

The counsel for the appellants were not called on for reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK: This appeal arises out of a suit brought by the plaintiffs, who are husband and wife, in which it was alleged that the second plaintiff was, at the time of her marriage with the co-plaintiff, the widow of one Pattenier. The suit was brought against the defendants to recover a share of the property of Pattenier, to which it was alleged that the second plaintiff, as his widow, was entitled; the plaintiffs also claimed a share which it was alleged had descended to her from a deceased child of Pattenier by her. The question is whether she was lawfully married to Pattenier, and the child legitimate.

The first defendant is a brother of Pattenier, and was an executor under his will; the second defendant was a son of Paramakuddi Kassenator, an uncle of the second plaintiff; and the third defendant was the wife of the second defendant, and a daughter of Pattenier by a deceased wife. The learned judge of the First Court found that there was a valid marriage. He said: "First, it is indisputable that second plaintiff lived in the house"—that is, the house of Pattenier—"subsequent to the death of testator's"—that is, Pattenier's—"second wife, the mother of third defendant and her minor sister and brother. Second, it is also indisputable that the second plaintiff gave birth to a child in testator's house, which child survived the testator, though by a few months only. Third, the evidence in favor of second plaintiff's being the wife vastly preponderates over that supporting the contrary view, not only in quantity, but in quality. If this be accepted, the legitimacy of the child from whom second plaintiff claims one thirty-second share is also indisputable. In a case of this kind, if there were really any room for doubt, the evidence on either side should be pretty evenly balanced; and yet quite the contrary is the case, defendants' being by far the weaker."

Upon appeal to the Supreme Court of Ceylon that judgment was reversed by the learned Chief Justice. It appears to their Lordships that the Chief Justice threw the *onus* of proof on the wrong parties, inasmuch as he held, in substance, that it was necessary for those who claimed by virtue of the marriage to prove what were the customs of the

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Tamils with regard to marriage, and that this marriage was legally performed.

Their Lordships have no doubt, upon the evidence, that Pattenier and the second plaintiff lived together as man and wife. It was proved that she visited with him, and that she presented betel to their friends, which their Lordships apprehend a concubine would not do. They not only lived together as man and wife, but there is strong evidence to show that there was a legal marriage.

Pattenier and the second plaintiff were Tamils, and the first defendant, who was called as a witness, proved what the custom was. He said, "She was married according to the custom of the country, but she is not the lawfully registered wife." It is true that the marriage was not registered; but it was not necessary to have it registered, inasmuch as the act which rendered the registration of marriages compulsory was not passed till after the marriage was celebrated. The witness proceeded: "The ceremony we usually perform is for four or five or six persons to be invited according to the wishes of both parties, and rice ceremony to be performed at the house of the bride or bridegroom. If the rice ceremony is performed it is marriage." The second plaintiff herself was examined. She said that she was twenty-two or twenty-three years of age: "I lost my parents when I was five or six years old. After their 367] death I was in charge of my sister *Valliamma and her husband. I was there up till a year after I reached puberty. I do not know the year. I then went to my uncle Kassenator's house; my aunt, his sister, coming and calling me. I remained there eight, nine, or ten days. After that my uncle, his wife, his son (second defendant),"—that is important—"his son-in-law and daughter, my brother and aunt, took me to Pattenier's house to marry me there." It appears, according to her evidence and to other evidence in the cause, that she was taken to the house for the purpose of being married. It also appears that her brother-in-law was anxious that she should be married to a brother of his, and not to Pattenier. She says: "We went on to the house. Rice was ready to be served. They spoke of serving me to the persons who accompanied me. Then there was a row. The row was commenced by my brother-in-law and brother, who stood at the gate." There were two brothers, one who stood at the gate and assisted in making the row, and another who afterwards executed a deed of dowry which will be presently alluded to. "I was at the time inside the house. When I heard the row I asked what

it was, and they told me that my brother and brother-in-law were at the gate making the row. Then my uncle and his son got out." In her cross-examination by the second defendant's advocate she said: "During the row, and before it ceased, rice was served to us, and the people went away. The rice was served before the row commenced. Pattenier gave me a kuree cloth. The tali was tied next morning; not tali, but he gave his jewels to my uncle's wife to put them on me, and she did so. There are now present as witnesses who were then present Kannavate, Pavamattee, Katuramen, and my uncle's wife. I do not know whether Sivahami is present here as a witness or not. On account of this row other ceremonies could not have been performed. Other ceremonies were necessary for marriage, but were not performed on account of the row. My relatives left at the commencement of the row."

Strong reliance was placed by the defendants upon the statement "that other ceremonies were necessary for marriage, but were not performed on account of the row." It is to be observed that that statement was obtained upon cross-examination, and was probably in answer to a leading question. The witness was, in all *probability, [368 better acquainted with what ceremonies were usually performed than what were actually essential to the legality of a marriage.

Their Lordships do not attach much importance to the answer. There is evidence from which it may be inferred that the serving of rice was the essential ceremony; and it was proved that rice was served. But the evidence of the marriage does not rest here. It is confirmed in the strongest manner by certain dowry deeds. On the 21st of October, 1866 (the marriage having taken place on the 20th), Peramakkuddi Kassenator, who was the uncle of the second plaintiff the father of the second defendant, and was also a notary, and therefore more likely than a young woman, the second plaintiff, to know what ceremonies were essential to the validity of a marriage, executed a deed by which he conveyed to Pattenier and the second plaintiff a garden by way of dowry. It says: "On the 21st day of October, in the year 1866, I, Peramakkuddi Kassenator, notary of Kattankuddiyiripu, in Batticoloa, do hereby acknowledge to have granted a garden in dower to Sampakkoddi Sinnepullai, my niece"—that is, the second plaintiff—"and Sinnepullai's husband, Sambekodiajar Pattenier, of the same place, to the following effect." Then, after describing the boundaries of the garden, it says: "And the

said garden, with all the produce thereof, are to be possessed and enjoyed by the aforesaid Sinnepullai and her husband Pattenier, according to their pleasure, forever." That deed was attested by four witnesses, and is stated to have been duly read over and explained to the parties, including Pattenier, and to the witnesses; and it is also proved by one of the witnesses that the deed was executed in triplicate, and that one of the parts was handed over to Pattenier, who retained it. It appears also from the evidence that Pattenier and the second plaintiff took possession of the garden; that they used it; and that the second plaintiff, after the death of Pattenier, executed a lease of the cocoa-nut trees growing in it to a tenant who was called as a witness, and who proved that under the lease he had possession of and gathered the cocoa-nuts. There seems to be, therefore, no doubt that Pattenier and the second plaintiff acted upon the deed, in which Pattenier was described as the husband of the second plaintiff. On the same day the brother of the 369] *second plaintiff acknowledged to have granted, in dower to his sister, money, jewelry, and other property, and that she and her husband were to possess and enjoy the same. That deed was also read over and explained by a notary public. It was attested by four witnesses, and it was handed over like the other deed to Pattenier and the second plaintiff; and it appears that the wife took possession of the property. In addition the deeds appear to have been registered in the office of the Registrar of Lands, so that it was made public that the property had been given to Pattenier and the second plaintiff as husband and wife upon their marriage. The second and third defendants claim the property through the husband, who, by retaining the deeds and taking the property under them, must be taken to have acknowledged that there was a lawful marriage.

A document was put in evidence marked E, which was signed by the second defendant as registrar, and which was a register of the death of the child of Pattenier and the second plaintiff, in which it was named Pattenier, which would not have been the case if it had been merely the son of a concubine. It was proved that the second defendant was one of the persons who went with the uncle and the second plaintiff to the house of Pattenier in order that she might be married, and he appears to have been present when the ceremony was performed. He therefore was capable of judging whether the marriage was a valid one or not, and whether the child was legitimate or illegitimate; and as a registrar of deaths he registered it as the child of Pattenier.

Then, again, when the plaintiffs were married in 1873 he signed the register of their marriage, in which the first plaintiff was described as a widower and the second plaintiff as a widow, which she would not have been if she had been merely a concubine of Pattenier. Therefore there is evidence, under the hand of the second defendant, in which it is in effect admitted that there was a marriage; that the lady when she married the present plaintiff was the widow of Pattenier; and that the child which she bore was a legitimate child.

Again, there was a petition put in by the second plaintiff on the 21st of March, 1870. The second defendant at that time had not married the daughter of Pattenier, and was not interested, *therefore, in setting up that the marriage was not a lawful one. The petition contained the following passage: "The petitioner begs to inform the court that she is the third wife of the late Sembecutte Kannaku Pattenier, of Surepatte, a principal rich man in this place. The petitioner further says that the said Sembecutte Pattenier (her husband) also gifted her clothes, and she used and enjoyed and lived with him, till his death, as husband and wife. The said petitioner further says that the said S. K. Pattenier married her and lived with her amicably, and also received dowry from her in writing, and she brought forth two children, who are dead. The petitioner further says that after the death of her husband his brother Sembecutte Vaigalie, has taken all the jewels and ornaments, the clothes, and he delays to return them;" and therefore she prays that she may be relieved. That document appears, according to the evidence, to have been prepared at the instance of the second defendant and with his knowledge. Therefore there is not only the fact that Pattenier and the second plaintiff lived together as reputed husband and wife, that she visited his friends as his wife, and that he held her out to the world as his wife, but that the second defendant has in documents under his hand acknowledged, at a time when he was not interested in disputing the marriage, that she was lawfully married. Notwithstanding all that evidence, and after the finding of the first court, the Chief Justice in his judgment says: "A great deal of evidence was gone into on both sides, and the onus was on the plaintiffs to prove (1) what are the ceremonies necessary to constitute a valid marriage in the Tamil caste, to which the parties belong; (2) that these ceremonies were duly performed at the marriage in question. On the first point the evidence is so conflicting that it is impossible to gather an intelligible ac-

count of what are the ceremonies necessary to constitute a valid marriage amongst the Tamil natives of the Batticoloa district." He did not say that it had been proved to his satisfaction that the marriage was not according to the custom; but merely that the evidence was so conflicting that it was impossible to gather an intelligible account of what were the necessary ceremonies, and he threw the onus of proving what were the necessary ceremonies on the plaintiffs, 371] and found that they had failed in making out *that all the necessary ceremonies had been performed. He proceeded: "So far as the evidence can be followed, the ceremonies seem to vary according to circumstances, such as the position and wealth of the bride and bridegroom, and whether a man or woman is married for the first time. The witnesses also differ as to what are essential ceremonies; and on a review of the whole of the evidence it appears clear that either there is not a well recognized ceremonial to be observed on occasions of marriage, or that the witnesses were wholly ignorant of what they were called to prove. It is admitted that all the necessary ceremonies were not performed at the marriage in question, but it is alleged that they could not have been on account of the disturbance which took place when the marriage was going on. We think this excuse, even if true, is insufficient in law, as a marriage cannot be taken to have been duly celebrated if any of the essential ceremonies were not duly observed, even though such omission was unavoidable."

It was contended by Dr. Phillimore that the presumption of marriage arising from cohabitation with habit and repute did not apply to the case of the Tamils and to Ceylon; but it appears from the authorities which he cited that, according to the Roman-Dutch law, there was a presumption in favor of marriage rather than of concubinage. It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country; namely, that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. Dr. Phillimore did contend that in a district where concubinage was not considered as immoral the same presumption would not arise; but their Lordships cannot agree with him in that respect. It is evident that in the district in which Pattenier lived wives are treated differently from concubines, and it is not because a number of persons live in a state of concubinage to be presumed that a man

and woman who are living together as reputed husband and wife are not lawfully married. It is evident from the parties going through the form of marriage that they intended to be married; and if they were not married *accord- [372 ing to the strict custom, it was not in consequence of their wish that it should be so. It appears clearly that they did consider that a valid marriage had taken place.

In the case of *Piers v. Piers* (*) it was laid down by the House of Lords that the presumption of marriage arising from cohabitation with habit and repute can only be rebutted by the clearest and most satisfactory evidence. The Lord Chancellor said: "I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris v. Davies* ("), as determined in this House. It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption which we are considering. He says: 'The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.' No doubt every case must vary as to how far the evidence may be considered as satisfactory and conclusive; but he lays down this rule, that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question."

In *De Thoren v. Attorney-General* ("), Lord Cairns, then Lord Chancellor, stated that the presumption of marriage is much stronger than the presumption raised with regard to other facts; and he referred to the *Breadalbane Case* ("), in which it was held that the presumption was one which not only might, but ought, to be drawn from cohabitation with habit and repute, although the cohabitation commenced with a ceremony which was not only invalid by reason of the real husband of the woman being alive at the time, but was known by both parties to be invalid.

Their Lordships having come to the conclusion that Pattenier and the second plaintiff lived together as man and wife, and that Pattenier held her out as his wife, the presumption of their marriage is not lightly to be rebutted. The Chief Justice did not find that the presumption was rebutted, but he threw the onus of proving a legal marriage according to the custom of the Tamils *upon the other [373

(*) 2 H. L. C., 331.

(*) 5 Cl. & F., 163.

(*) 1 App. Cas., 686; 17 Eng. R., 72.

(*) Law Rep., 2 H. L., 269.

side. Their Lordships think that the learned Chief Justice was in error in overruling the decision of the judge of the First Court, who had come to the conclusion upon the evidence that there was a legal and a valid marriage.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and that the decree of the First Court be affirmed. The respondents must pay the costs of this appeal.

Solicitor for appellants: *A. Cayley*.

Solicitor for second and third respondents: *F. H. G. Payne*.

[6 Appeal Cases, 373.]

J.C.*, February 22, 1881.

[PRIVY COUNCIL.]

JOHN T. LAWLESS (Manager of the Bank of British North America), *Appellant*; and JAMES SULLIVAN and Others (Assessors of Taxes for the City of St. John), *Respondents*.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

New Brunswick—31 Vict. c. 36, s. 4—*Income Tax leviable on Balance of Gain over Loss.*

The tax imposed by sect. 4 of New Brunswick Act, 31 Vict. c. 36, upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss.

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT F. COLLIER, and SIR RICHARD COUCH.

[6 Appeal Cases, 386.]

J.C.*, February 23, 1881.

[PRIVY COUNCIL.]

*JOHN BATEMAN, *Plaintiff*; and JAMES SERVICE, [386]
Defendant.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Conflict of Laws—Liability of Foreign Corporation—Lex Loci Contractus.

Held, that the Western Australian Joint Stock Companies Ordinance Act, 1858, does not apply to foreign corporations or to companies incorporated out of Western Australia and properly and lawfully carrying on business as such. Consequently a limited company incorporated elsewhere, not having complied with its provisions, can nevertheless carry on business and make contracts in Western Australia by its agent without its members being liable individually for its debts and engagements.

Held, further, that a company duly registered and incorporated in Victoria could not be again registered as a company in Western Australia.

Bulkeley v. Schutz (!) approved.

APPEAL from a judgment of the Acting Chief Justice of the Supreme Court (Feb. 20, 1880), whereby judgment, with costs of defence, was given for the respondent in an action brought against him by the appellant.

The action was to recover £1,233 9s. 2d., for goods sold and delivered, freight earned, money lent, and money paid by the appellant to and for the use of the Rockingham Jarrah Timber Company, Limited. The judgment of the court therein was obtained upon a special case, the terms of which are sufficiently stated in the judgment of their Lordships. The two questions submitted by the case were: 1. Whether, under the circumstances, which are sufficiently stated in the judgment of their Lordships, the respondent was liable for the payment of the appellant's claim, the same being for a debt due to the appellant from the company, incorporated in Victoria, but not registered in accordance *with [387 the Western Australian Ordinance; and 2. Whether he could be sued for the said debt without joinder in the action of the other members of the company.

The Acting Chief Justice decided that the respondent was not liable for the appellant's claim, and ordered the appellant to pay to the respondent his costs of the action.

Mr. *Wills*, Q.C., and Mr. *J. E. Horne*, for the appellant, contended that according to sect. 4 of the Joint Stock Companies Ordinance, 1858, there was a several right of action

**Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH and SIR RICHARD COUCH.

(!) Law Rep., 3 P. C., 764.

against the respondent in consequence of his non-compliance with the conditions with regard to registration prescribed thereby. The contract sued upon was made in Western Australia, and must be presumed to have been made with a view to the law of that colony, by which law the parties must be taken to have intended to bind themselves and to be bound. Though the company of which the respondent was a member was formed in Victoria, it was so for the purpose of carrying on business in Western Australia, and its transactions in this latter colony must be governed by its law; and the respondent had not by that law limited his liability. Reference was made to *General Steam Navigation Company v. Guillon* (1); *Newby v. Von Oppen* (2); *Griffith v. Paget* (3); *Princess of Reuss v. Bos* (4); *Smith v. Anderson* (5); *Greenwood's Case* (6); *Lindley on Part.* (last ed.), vol. i, p. 333; *Story's Confl. of Laws*, s. 29.

Mr. Benjamin, Q.C. (Mr. Romer with him), for the respondent, contended that the company of which the respondent was a member was, so far as the law of Western Australia was concerned, a foreign corporation. As such it was entitled to trade and did trade in the colony of Western Australia. It was not a partnership within the meaning of sect. 4 of the ordinance. He referred to *In re General Company for the Promotion of Land Credit* (7), which is *Princess of Reuss v. Bos* under another name. The ordinance has nothing to do with this case: see sects. 31, 44. Again, 388] *partners are liable jointly, but as to joint and several liability see *Kendall v. Hamilton* (8). [He was stopped by their Lordships.]

Mr. Horne replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH: This is an appeal from a judgment of the Acting Chief Justice of Western Australia upon a case which was stated for the opinion of the court. The case states that "previous to and at and within the terms mentioned in the particulars of demand, and subsequent thereto, the defendant was, with more than ten other persons, a shareholder in and he was also one of the directors of a company which was duly formed, incorporated, or registered in the colony of Victoria, according to the laws in force in that colony in that behalf, under the style of the Rocking-

(1) 11 M. & W., 877.

(4) Law Rep., 5 H. L., 197.

(2) Law Rep., 7 Q. B., 293; 1 Eng. R., 323.

(5) 15 Ch. D., 273.

(6) 3 De G. M. & G., 459.

(3) 6 Ch. D., 511; 23 Eng. R., 110.

(7) Law Rep., 5 Ch., 363.

(8) 4 App. Cas., 504; 33 Eng. R., 347.

ham Jarrah Timber Company, Limited, and all the shareholders except two," who are named, resided, and those two now reside, out of Western Australia, and out of the jurisdiction of the court; that "the company," as stated in the memorandum of association, was formed in Victoria for the object, amongst others, "to buy, sell, or otherwise deal in Jarrah timber and other timber in Western Australia or in any other part of the world." The case then states the registration of the company in Victoria and its incorporation there, and that the organization and government of the company were exclusively in Victoria, where its directors all resided, and where it had its principal place of business; that the company carried on business on a large scale in Victoria, and that its operations in Western Australia were conducted by Mr. William Wanliss, the then local agent and manager of the company, who acted under a power of attorney, but that the company was satisfied with its incorporation and privileges of limited liability acquired in Victoria, and took no steps to procure its incorporation with liability limited in Western Australia, either by royal charter, letters patent, or act of the Western Australian Legislature; nor has it ever been registered under the Joint Stock Companies *Ordinance of 1858. It also states the [389 mode in which the business was carried on, and that the checks by which payments were made were in the form: "The Rockingham Jarrah Timber Company, Limited," signed by William Wanliss. It is not disputed that the business was carried on by William Wanliss, in Western Australia, as the agent of a limited company incorporated in Victoria. The transactions were entered into by him as such agent, and the credit was given to such company. The question in the case was, whether the defendant, who was a shareholder in the company and one of the directors, could be made liable for the debt which had been contracted by Wanliss as its agent.

In the argument for the appellant it was conceded that the general principle was, as stated by Mr. Justice Lindley in his work on Partnership, "that if a company is incorporated by a foreign government so that by the constitution of that company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members as such would be the same in this country as in the country which created the corporation." But it was contended that the Legislature of Western Australia had a right, if it thought fit, to annex any kind of condition to the carry-

ing on business in their own territory, and that, by the construction which should be put upon the Ordinance of 1858, it had enacted that unless a foreign corporation, carrying on business in Western Australia, complied with this ordinance and was registered according to its provisions, its individual members should be liable to be sued for its debts. It was stated, and properly, that the real question in the case was whether the Western Australian Legislature so enacted.

In considering that question, we may first look at the principle which is laid down by Story (¹), and quoted by the Chief Justice in his summary of the argument for the plaintiff, in these words: "In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests." Therefore, we have to see [390] whether, upon the true construction of this *Ordinance, the Legislature of Western Australia has said that a company incorporated in another colony or in a foreign country, not having complied with its provisions, cannot carry on business or make contracts in Western Australia by its agent without its members being liable individually for its debts or engagements.

Now an examination of the ordinance appears to show that this was not the intention. Its title is, "An Ordinance for the incorporation and regulation of joint stock companies and other associations, and for limiting the liability of certain of the same." The preamble shows that one of the objects was that members of joint stock companies should be enabled to limit the liability for the debts and engagements thereof to which they are or would be subject. The 4th section is: "If more than ten persons shall, after the 1st day of January, 1860, carry on in partnership any trade or business having gain for its object, unless they are registered as a company under this ordinance or are incorporated or otherwise legally constituted by or in pursuance of some private ordinance, royal charter, or letters patent, every person so acting shall be severally liable for the payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other members of the partnership." These words are not descriptive of a corporation carrying on business in Western Australia by its agent. You cannot say that a corporation is ten persons or more carrying on business. It may or may not be that the corporation which was formed in Victoria

(¹) Conflict of Laws, 2d ed., sect. 38.

consists of more than ten persons. That is not a matter to be inquired into in Western Australia. The whole enactment appears to be applicable to a case where persons intended to commence business in Western Australia in partnership; and if there were more than ten, then, unless registered as a company, each might be sued for the whole debts of the partnership without joinder of any other members of it. It appears to refer to a company proposed to be formed for the purpose of carrying on business in Western Australia—not to a corporation existing in another place and coming to Western Australia to carry on some business there through its agents. The case of such a corporation does not appear to have been contemplated by this section, and the presumption certainly would be, according to the authorities before *mentioned, that this was not [391] intended. It is not to be presumed that there was an intention, contrary to the comity of nations, to prevent a foreign incorporated company carrying on business at all in the colony, because there would be so many difficulties in the way of a foreign incorporated company registering its members in accordance with the provisions of this ordinance, that practically it could not do so. Then the 5th section contains words which show that what was meant is, not an existing incorporated company coming to Western Australia to trade, but a company which was to be formed there. It speaks in several places of the proposed company. And sect. 18, and other sections which have been referred to by Mr. Benjamin in his argument, show that in many instances it would be impossible for a foreign company to comply with the requirements of this ordinance. Sect. 18 says, that "Once in every year a list shall be made of the persons who, on the fourteenth day succeeding the day on which the ordinary general meeting of the company, or, if there is more than one ordinary meeting in each year, the first of such ordinary general meetings, is held, are the holders of shares in the company," and sect. 35 provides that there shall be a general meeting of the company held once at least in every year. In this instance there appears to have been no shareholder in Western Australia, and it might frequently occur that there would be no shareholder in the foreign company resident there. Consequently those provisions could not be complied with.

The whole scope of this ordinance appears to their Lordships to be opposed to the view that it was intended to apply to a company which was incorporated elsewhere. Its object was one which might well be contemplated by the Legisla-

ture of Western Australia; namely, that persons there who wished to carry on business in partnership with a limited liability for the debts and engagements thereof, if there were more than ten of them, should be registered, but it was not meant to apply to foreign corporations, or companies incorporated elsewhere and properly and lawfully carrying on business as such.

This is in accordance with the decision of their Lordships in the case of *Bulkeley v. Schutz* (¹), where it was held that 392] "A *railway company and a partnership complete and existing in a foreign country is not within the purview of the English Joint Stock Companies Acts of 1856, 1857, so as to enable H. B. Majesty's Consular Court in Egypt to issue a sequestration against such of the members of the company as were resident within the jurisdiction of that court, for not complying with an order of that court to register the company as one of limited liability under the English Acts." The company there, being a complete and existing company, could not be registered as one of limited liability under the English Acts. Applying that decision to the present case, it is an authority that this company, being duly registered under the ordinance of the colony of Victoria, and incorporated there, could not be again registered as a company in Western Australia. It was mentioned in the course of the argument that it would not be possible so to register it without, as it were, first disintegrating the company, and making it cease to be, as far as Western Australia is concerned, a corporation at all. But it is conceded on the part of the appellant, and appears from the case, that it was carrying on business in Western Australia, and was dealt with and given credit to, as an existing company. It appears, therefore, to their Lordships that the contention on the part of the appellant that this ordinance is to be construed as prohibiting this company from carrying on its business in Western Australia as a corporation, and making the individual shareholders liable, cannot be supported. That was not the intention of the Legislature of Western Australia. It was not intended that where business was carried on in this way by the agent of a corporation, and credit was given to it through its agent, the individual shareholders should be made liable.

Their Lordships, therefore, will humbly advise Her Majesty that the judgment which is appealed from be affirmed, and the appeal dismissed with costs.

Solicitors for appellant: *Wilkinson & Drew*.

Solicitors for respondent: *West, King, Adams & Co.*

(¹) Law Rep., 3 P. C., 764.

[6 Appeal Cases, 393.]

H.L. (E.), March 24, 25, 29-31; April 1, 1881.

[HOUSE OF LORDS.]

***THE MAYOR AND ALDERMEN OF THE CITY OF LONDON, *Appellants*; and THE SHAREHOLDERS (incorporated) OF THE LONDON JOINT STOCK BANK, *Respondents*.** [393]

London—Foreign Attachment—Garnishee.

The process against a garnishee, to enforce obedience to the jurisdiction of the Lord Mayor's Court in foreign attachment, is personal, and cannot be applied to a corporation aggregate.

Where, therefore, a corporation aggregate was cited, as garnishee, to appear in the Lord Mayor's Court, it was held entitled to maintain prohibition.

The suit of foreign attachment is founded upon ancient custom, and in itself is perfectly valid. The process by which it is sought to be enforced must be strictly pursued according to the custom. Fictitious summonses and returns will render the suit invalid.

No payment, but a payment made by compulsion of law, can discharge a garnishee from his original liability to his creditor.

THIS was an appeal against a decision of the Court of Appeal, which had affirmed a previous decision of the Common Pleas Division (*).

The respondents had been incorporated under the Companies Act, 1862. They had no public officer to represent them in suits in courts of justice.

On the 18th of March, 1874, Sarah Griesiell levied a plaint in the Lord Mayor's Court against Thomas Griesiell for the recovery of a sum of £72 18s., and, according to the forms of that court, issued a process of foreign attachment against the respondents, alleging that they had in their hands moneys of the said Thomas Griesiell to that amount. On the 24th of April, 1874, the respondents moved in the Common Pleas Division for a writ of prohibition, and were ordered to declare in prohibition. They did so accordingly. The appellants put in certain pleas setting forth *the custom of foreign attachment in the city of London, and justifying what had been done under that custom. Demurrers to these pleas were put in, and on the 2d of November, 1874, the Common Pleas Division delivered judgment against the present appellants. That judgment was taken before the Court of Appeal and partly argued, but the farther argument was suspended until certain issues of fact, arising on the pleadings, should have been determined, for which purpose a special case in the nature of a special verdict was to be prepared. This was done, and on argument thereon the

(*) Affirming 1 C. P. Div., 1; 5 C. P. Div., 494.

original decision of the Common Pleas Division was affirmed. This appeal was then brought.

The special case stated, at considerable length, the custom and the formal proceedings under it. The following portions of the special case are all that are necessary to be inserted here:

Par. 12. "No process against the defendant issues, and no notice is given to him of the action or attachment, but the plaintiff makes an affidavit of debt, and gives information in the Mayor's Court office, that the defendant has moneys or goods in the hands of —— (afterwards the garnishee).

Par. 13. "Thereupon the serjeant-at-mace serves, upon the person named, a notice, attaching in such person's hands all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands and custody, of the said defendant, to answer the said plaintiff, and that you are not to part with such moneys, goods, or effects without license of the court.

Par. 14. "The next step is to issue a *scire facias* calling upon the garnishee to appear and show cause why the plaintiff should not have execution of the goods of the defendant in the garnishee's hands.

Par. 15. "If the garnishee does not appear, judgment is given for the plaintiff against him by default.

Par. 16. "If the garnishee does appear, the appearance is recorded, and then a record is made up stating the matters aforesaid, and containing a number of other averments, which, whatever their origin, are now, and have long been, formal and fictitious." Other proceedings are taken, the issues are tried, and judgment (if the case is proved) is given against the garnishee. The plaintiff in the case may then 395] have execution against the garnishee, to *the amount of the debt, upon the goods in the garnishee's hands. This may be the case though the defendant has never been personally summoned, nor has appeared. Should he appear, the foreign attachment is dissolved. Upon execution against the garnishee he is discharged as to the defendant in the action, so far as the goods taken in execution are concerned.

Par. 23. "Besides these proceedings the record of foreign attachment made upon the appearance of the garnishee mixes up with the true history of what has been done, many of which are now, at all events, purely fictitious matters. It begins by stating that the plaintiff has summoned the defendant in an action of debt, that the serjeant-at-mace has returned that the defendant has nothing within the city by

which he might be summoned, and that thereupon the plaintiff has, by word of mouth testified to the court, that some other person has money or goods of the defendant in his hands within the jurisdiction, and that thereupon the court has ordered the serjeant-at-mace to attach the defendant by such money or goods in the hands of such other person. It then goes on to state a return by the serjeant-at-mace of an attachment made accordingly (the last averment being according to the fact), and to allege that at that court and three subsequent courts the defendant has been solemnly called and made default, and that such four defaults have been recorded. It then proceeds to state (truly) the *sci. fa.* to the garnishee, and the subsequent proceedings already described." Par. 28. "If the garnishee did not appear, judgment went against him by default, and execution against the defendant's property in his hands might be issued. If he chose to appear, he was obliged to find sureties to be present from court to court, until the plea of foreign attachment should be ended; otherwise, he was committed to prison." Par. 29. "Upon judgment for plaintiff the garnishee could hand over the money or goods attached; if he did not, he might be arrested and committed to prison." Par. 54. "A *capias* has been issued for this purpose, and that form has in many instances been employed where corporations aggregate, but without a public officer, or any such individual person to represent them, have been garnishees. But it did not appear that the propriety of this form of proceeding had ever become the subject of judicial decision."

**The Attorney-General* (Sir Henry James), Mr. [396 *Webster*, Q.C., and Mr. *R. S. Wright*, appeared for the appellants, and relied on the long exercise of this custom, and on the fact that corporations had in many instances, and without objection made, been the subjects of proceedings in foreign attachment. The fact that some of the statements made in the course of the process were legal fictions was not material. In many cases in the superior courts themselves, there were allegations of proceedings which were merely formal and fictitious; but that did not affect the jurisdiction itself. What had been done here had been done immemorially, and the custom had been recognized and confirmed by statute ('). A corporation would come within the

(1) 2 Wm. & M., sess. 1, c. 8: "For reversing the judgment in a *quo warranto* against the City of London, and for restoring the City of London to its ancient rights and privileges." See also 20 & 21 Vict., c. clvii, the Lord Mayor's Court Extension Act.

meaning of the word "person" ⁽¹⁾, and the charters to the city made the custom applicable to all persons whatever. There is not any reason why a corporation should not have goods in its hands attached as a garnishee, the process in fact being against the corporation in its character of stakeholder, and the process affecting the goods, that is the property, of the defendant in the action, and not the proper goods of the garnishee. A court has an inherent right to enforce obedience to its lawful orders, and no doubt there is process of the court applicable as against corporations. If the pleadings as they now stand are defective, the custom itself being perfectly valid, they may be amended, but the jurisdiction of the court itself cannot be assailed.

Mr. *Benjamin*, Q.C., and Mr. *W. G. Harrison*, Q.C. (Mr. *Kemp*, Q.C., was with them), for the respondents: Where processes are not real but fictitious, the jurisdiction which affects to be founded on them cannot be sustained. Assuming everything in favor of the jurisdiction of foreign attachment 397] ment "as an ancient custom, it is clear that that jurisdiction cannot properly be enforced against a corporation, which cannot be arrested and committed to prison, and yet without those acts there can be, under the alleged custom, no enforcement of the jurisdiction against a garnishee. In the certificates of the custom, corporations are never mentioned as subject to it. For the reason already given the custom cannot be, in practice, made applicable to them. The confirmation, by statutes, of the customs of London were only confirmations of general and ascertained public rights, but did not have the effect of establishing customs which were impracticable in themselves and could not be enforced, and were, in the mode of exercising them, contrary to the principles of law. It is contrary to the principle of law to make the holder of another man's property, hand over, to a third person, that property, when the person to whom it belongs has never received notice that his rights to it are to be called in question. The custom set up here is that that may be done—but that is contrary to law—and the special case shows that an unlawful and fictitious mode of procedure is sought to be followed. That cannot be allowed, and the garnishee, the corporation, is entitled to claim prohibition.

(1) 2 Inst., 722, in commenting on the 39 Eliz., c. 5, takes the words "all and every person and persons," and says these words regularly do extend to any body politic or corporate . . . , to such bodies

politic and corporate as may alien, as mayors and commonalties, bailiffs and burgesses, &c., and the like, and to all other persons whatsoever."

[The cases and text-books referred to in the court below on both sides were cited. They are so fully examined and commented on in the judgments that it has not been deemed necessary to repeat the references to them here.]

April 1. THE LORD CHANCELLOR (Lord Selborne): My Lords, this question arises upon a prohibition obtained by the respondents against the appellants, the corporation of London, to prohibit certain proceedings against the respondents (who are a corporation aggregate) by way of foreign attachment according to the custom of the city. The case in the first instance came before the Common Pleas Division of the High Court of Justice upon demurrer; the demurrer of course assuming the facts, as pleaded by the corporation, to be true. According to those facts, as they were then pleaded, the custom appeared in all respects to have been followed in point of fact; that is to say, the different steps and proceedings appeared to have been taken according to *the custom as anciently certified, subject to this [398 question only, whether the custom, so followed, was applicable to a corporation aggregate. The Common Pleas Division held that it was not; and the substantial point to be now determined is, whether that decision, upon those pleadings, was right; for which purpose we must leave out of sight all variance between the facts as they really were, and the facts as pleaded.

When the case was brought before the Court of Appeal, both sides agreed, that it would be convenient to have the facts before the court, as well as the pleadings; in order that the question of substance might be determined upon the true materials in that stage, instead of being postponed, to be determined afterwards in some other way. A special case was accordingly stated, by which it appeared, that all the preliminary and introductory proceedings, pleaded as having taken place, were merely fictitious, and had never taken place at all. Other facts of importance, with regard to the practice under the custom, at different times, were also found by the special case; and it was agreed, that, for the purposes of the decision of the demurrer upon appeal, the court should take judicial notice of all the facts so found by the special case.

I pause to observe that, under those circumstances, there was really no question whether the custom itself, such as it was certified to be in ancient times, if followed in fact, in a case properly falling within it, was good or bad; and nothing which has taken place in the case, nothing which may now take place in your Lordships' House, will, in my

opinion, throw any doubt upon the validity of that custom, if duly and properly followed in cases which really fall within it.

Upon the facts, as stated in the special case, the Court of Appeal held, first, that the custom had not been followed in divers necessary points, as to which fictitious statements had been introduced upon the city record; and, secondly, that the demurrer, taking into account both the original pleading and all the new matter, of which, according to the agreement, the court was to take notice, had been properly disposed of by the Common Pleas Division. In this state of things, there is now only one question really before your Lordships; and that is, whether a corporation aggregate is within the custom. It was not seriously disputed at 399] *the bar that the custom as it had been anciently certified, which alone could be binding, required that there should be a real defendant, and real proceedings taken with a view to summon him, and to put him in default, before a foreign attachment could issue against his goods or his debts, in the hands of, or due from, a third person in the city. It was admitted, that there had been, in this case, no such proceedings; and it was felt, therefore, that the judgment of the Court of Appeal, upon the whole facts, was one which it would not be possible to disturb. The argument was in substance confined to the question upon the demurrer, into which of course these facts contradicting the matters pleaded could not enter, although the other facts as to the custom, and the practice under it, found by the special case, can now be taken judicial notice of, as they were in the Court of Appeal.

Addressing myself to that question, which I consider the only one before your Lordships' House, namely, whether a corporation aggregate is within this custom or not, the first matter which it is proper to consider is the nature of the custom itself. Foreign attachment is an incidental process against a defendant to a suit, who has not appeared, having been summoned according to the course of the court, to compel his appearance. The only thing which makes such a custom reasonable at all, and capable of being sustained in law, is, that the court which has jurisdiction over the defendant, is in substance, by this custom, acting against the defendant alone, to compel his submission to that jurisdiction. For this purpose, it arrests or attaches his goods within the jurisdiction, or the debts owing to him within the jurisdiction, (which are equivalent to his goods,) by way of security to enforce his appearance, in whatever hands

they may happen to be found. The stakeholder, the person in whose hands these goods of the defendant may be, or from whom the debt is due to the defendant, has no interest in the matter, and does not suffer in any interest of his own, so long as he is properly indemnified; and the custom, if duly followed, indemnifies him.

As against the garnishee (that is the third party, the stakeholder) the whole proceeding is *res inter alios acta*. He is no party to the suit; no judgment, in any proper sense of that word, can pass against him in that suit, or be executed against *him, on any principle which is [400 applicable to a defendant before a competent court. In order to bind him, and in order also to indemnify him, the custom must be strictly applicable to the case, and it must be followed in all material points. The effect of the custom, when so followed, when the goods in his hands are delivered over, or when the debt due from him is paid, (or security given by him for its payment, if it is not payable at the time,) is to discharge him, not by virtue of the terms of his contract, but against that contract, and without the consent of the bailor or creditor, from all further liability for the goods or money to which the bailor or creditor was entitled. That is the peculiar effect of the custom; and upon what principle is it possible that such an effect can be produced? On one principle only, that of a delivery or payment by compulsion of law. If that element were absent, it would be impossible that he could be absolved, as against his creditor, from a debt which he has paid, without the creditor's authority, to a person to whom it was not payable by the contract. But if it be by compulsion of law, then he is discharged. It may be by compulsion of law if the custom is reasonable; and the custom, being long established, is not in law unreasonable, so long as its operation and effect is strictly limited to its proper object, that of compelling the submission of a defendant, in an action duly instituted against him before a competent court, to the jurisdiction of that court in that action; and so long as it is pursued only against that which is ascertained to be the property, or the debt, of that person, the defendant in the action, in the hands of the garnishee.

Therefore, my Lords, execution, by some process of law which amounts to compulsion, is indispensable for this purpose, indispensable for the indemnity of the garnishee, and therefore indispensable in order that the garnishee should be bound. And so it appears to be, according to the certificate given by Starkey in the year 1481, in the case of

1881

Mayor, &c., of London v. London Joint Stock Bank.

H.L. (E.)

Bourghcier v. Colyns (*). "After such security found, and execution of that sum, so in the hands and custody of that other person attached and defended, had by the plaintiff in the same plaint, such other person should be discharged 401] *of the same sum against the defendant named in the plaint aforesaid, and the same defendant should likewise be discharged of so great a sum of the debt specified in the same plaint against the plaintiff named in the said plaint." When the certificate says, "after such security found," that means, security which is to be given for restitution within a year and a day, if the defendant appears and gives bail as the custom requires. That having been the essential condition of the discharge of the garnishee according to this ancient certificate, the modern cases of *Wetter v. Rucker* (*) (which was not indeed the first case of the kind, for earlier authorities are referred to in it) and *McGrath v. Hardy* (*) show emphatically, that the whole effect of the custom against the garnishee depends upon the fulfilment of that condition. Without execution, it is nothing; without execution the payment is voluntary; and all the other proceedings leave him, although he hands over the goods or pays the money, still liable to his original creditor.

Now what is execution, within the meaning of that principle? I apprehend it is that process of the court against a garnishee, which, if disobeyed, the court can and will enforce against him. It is not necessary to refer to the form of that process; I rather think, from the statement in the 29th paragraph of the special case, that it must be what is there set out, an authority from the court to its officer to receive the debt, if it be money, or the goods, if it be goods.

In that state of the case, that being the principle by which it must be governed, we have nothing to do here with the question, whether the mere terms of the custom, as certified by Starkey, and stated in other ancient books (such as the *Liber Albus*, and the "City Law,") would by themselves show that a corporation is excluded. It may be assumed, that they do not. Starkey in his certificate states the custom thus: "it shall have been testified and alleged, by the plaintiff, that any other person, for whatever reason, should be indebted to the defendant in any sum of debt." No doubt, as far as these words go, there is nothing to prevent a corporation from coming within the custom; because the

(*) Law Rep., 2 H. L., 242 n.; Thorpe's Saxon Laws, 35; Bohun's Privilegia Londini, ed. 1723, p. 253 *et seq.*

(*) 1 Bro. & B., 494.

(*) 4 Bing. N. C., 782.

word "person" might be applicable to a corporation, unless there were something *in the context to exclude it; [402 and in the mere reason of the thing, if in all other material and necessary respects the custom could be pursued against a corporation, there would not appear to be any objection to understanding the word "person," there, in as large a sense as it is capable of in law. The same remark applies to the *Liber Albus*, and the "City Law," which is a translation from it. In the "City Law" (*), the words are, "where it is alleged that the defendant hath goods and chattels or debts in other's hands, or in other's keeping, within the said city." These words are certainly large enough to include a corporation, if, in all other necessary respects, the custom could be applied to it.

But the question is, whether that which is of the essence of the custom, in order to bind the garnishee and to discharge him, can be done in the case of a corporation? Whether the custom provides any means of enforcing the delivery of goods, or the payment of a debt, against a corporation garnishee? If it does not, then according to principle, and according to the authorities, a payment by the corporation would be voluntary, as was decided in *Wetter v. Rucker* (*). Though everything else may have been done which the custom would authorize, yet, if it has not been brought to the point of compulsion in law (which it cannot be if there are no means of compulsion in law) the payment is voluntary, and the garnishee is not discharged.

I do not think we have here anything to do with the question whether a corporation can or cannot be a defendant to a suit in the Lord Mayor's Court. That, as I understand the matter, does not depend upon custom. The city courts are held under the city charters; and, if there be nothing to prevent a corporation from being sued, I am not at all satisfied, that there are not processes of the city court by which a judgment of that court may be executed, either in favor of a corporation plaintiff, or against a corporation defendant. When, in a court of competent jurisdiction, final judgment passes against a defendant upon a matter in dispute, execution follows by all the ordinary legal means, and, to use language which was used at the bar, the court will employ all its inherent powers to enforce its judgments. The *city court, in that respect, would be like any [403 other of the courts of the realm. Of those inherent powers to enforce judgments the writ of *fiery facias* is one, and there are other writs analogous to it; and against a corpo-

(*) At page 109.

(*) 1 Bro. & B., 494.

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ration, there is also sequestration or distringas. There is therefore, according to the ordinary law, and having regard to the inherent powers of courts to enforce their judgments, no apparent difficulty in using against a corporation those means; which are as effectual against a corporation as against anybody else, and one of which is specially adapted to the particular case.

These considerations, however, are inapplicable to the case of a person, who is not a defendant sued by any plaintiff in a court of competent jurisdiction, who is not amenable as such to the ordinary process of that court, but who is affected only by a collateral process against another person, the defendant in a suit. There are no ordinary means, there are no inherent powers of the court, when the court is dealing, not with a defendant who has had final judgment against him, but with a mere stakeholder who is not a party. As to such a person, everything must depend upon the custom alone; nothing can be done, which the custom cannot be shown to authorize. *Fieri facias* is clearly inapplicable in such a case, because there is no judgment against the garnishee in any true sense of the word; certainly there is no final judgment to be executed. With regard to distringas or sequestration, those are processes which might perhaps have been available, if there had been a custom to use them; but, if there is not such a custom shown, I know no principle of law from which you can infer or imply that they are to be used, merely for the purpose of bringing within the custom a legal person, who, otherwise, could not be put in the position of having to pay a debt by compulsion of law.

My Lords, the only customary mode of execution against a garnishee, of which any proof has been offered, is a process *in personam* to compel obedience to the attachment; on the principle, I suppose, that the court having authority, founded on its jurisdiction against the defendant in the action, to attach that defendant's goods, or a debt due to him, when it exercises that jurisdiction, and gives notice of it in 404] the customary manner to a *third party (the garnishee), he is bound to render obedience to that lawful order. It is upon the footing of personal disobedience to an order binding on him, in a case where there is no jurisdiction against his property, but only against his person, that by personal process his obedience to that order is secured.

It is admitted that *Gascoyne v. Penyke* (*), a very ancient case of the 14th century, decided in the year 1374, is the only

(*) Rolls and Memoranda (A.D. 1374), A. 19, Roll 19.

authority which can be discovered in which anything else than personal process clearly appears to have been used. I say "clearly appears," because it was contended at the bar, that you might infer from one other case, that there had been some other process; I will presently mention that case. But it is stated in the special case that there is no authority discoverable for the use of any but personal process, except *Gascoyne v. Penyke* (¹), and that statement was not otherwise disputed at the bar, than by suggesting that you might infer something of the same kind to have taken place in one or two other instances, in which it did not expressly appear.

Now, my Lords, *Gascoyne v. Penyke* (¹) has really been given up at the bar. I do not think that it can possibly be reconciled with what appears upon the whole course of the practice under the custom, from Starkey's certificate downwards; because in that case the process of *feri facias* against the garnishee's goods was ordered to be issued and executed in the first instance, and if nothing could be taken under that, then the personal process of *capias* was to be resorted to. It is admitted, on all hands, that the practice under the custom has been to issue at once the personal process of *capias* against a person subject to that process; and therefore to interpose, as something to come before it, the very different process of *feri facias*, is wholly inconsistent with the practice which is proved to have been followed.

An ingenious (and, if the record would admit of it, a not improbable) explanation of that case of *Gascoyne v. Penyke* (¹) was suggested in the able argument of Mr. Harrison at your Lordships' bar. It was this, that there had been, in that case, a prior proceeding in which the garnishee had appeared, and in which, admitting the justice of the plaintiff's claim as against the *defendant as he had [405 made it in the action or suit, he admitted also that he was himself authorized to receive, but had not at that time received, from two particular debtors, moneys which were due from them to the defendant. The suggestion was, that if the custom under these circumstances was duly followed, the court, when he made that admission, would have adjudicated against him, that, when he received those moneys from those persons, he should pay them over, according to the custom, to the officer of the court for the purposes of the suit; and not only so, but that he should then and there give security (his own and that of sureties, or perhaps

(¹) Rolls and Memoranda (A.D. 1374), A. 19, Roll 19.

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only means of enforcing his obedience. In the special case, at paragraph 54, we are told, that although from the year 1852 down to 1872—that is, within the last thirty years—there were numerous instances in which moneys in the hands of corporations aggregate had *de facto* been attached in the Mayor's Court and judgment signed against the garnishees, and although in many of those cases execution had been actually issued, and the money paid by the garnishee, under that process, yet we are also told that “the process issued has in every instance been in the form of a *capias*” (that is, personal process), “the direction to the serjeant-at-mace being to take the City Bank or the Peninsular and Oriental Steam Navigation Company, or whatever the corporation might be.”

It does, therefore, appear from that paragraph, that, within a period of time so recent as to be of no weight in the case, (to say nothing of the other irregularities which were customary during that period, to which I have already referred,) this process has been used against corporations, and with effect, in this sense, that garnishee corporations have paid money, whatever risks they may have run by it. But 408] so far from any attempt being made to *claim the right of enforcing that process against corporations, even during that period, by any other than personal process, the uniform practice has been to issue a *capias*, assuming that the body of the City Bank, or that the body of the Peninsular and Oriental Steam Navigation Company, could be taken, and, I suppose, put into prison or detained in custody in some manner unexplained. Nothing can more strongly show, that no other mode of making this attachment compulsory upon any garnishee was known.

There is another statement, in the 28th paragraph of the special case, which is material upon this subject; and that is, that whenever a garnishee chose to appear, upon his appearance he had a right, (as of course,) to say that he owed nothing to the defendant and had no goods of the defendant's in his hands. But if he chose, for this or any other purpose, to appear, then before he could be heard, or could plead at all, or make his defence, “he was obliged to find sureties to be present from court to court until the plea of foreign attachment should be ended; otherwise, he was committed to prison.” Except on compliance with that condition, the garnishee would not be allowed to make his defence. How can a corporation be present from court to court? It is said, “By attorney.” But if the object is to have the means of committing him to prison, if he does not

obey the process, I apprehend that the presence of an attorney would be of exceedingly little value. Not only was he to give security to be present from court to court, but "otherwise he was committed to prison." How could a corporation be committed to prison? The sureties he gave (if he gave sureties) were not that he should pay the amount if the issues were found against him, but that he should be present in the body from court to court until the plea of foreign attachment was determined; not present by his attorney, but "present *in the body*;" that his body should be taken, if he was guilty of disobedience to the lawful orders of the court.

That this is an accurate statement, is clear from several of the ancient authorities set forth in the printed case. There is a case which arose on *habeas corpus* in 1443, *Welles' Case* ⁽¹⁾, and by the return it appears, after stating the preliminary *proceedings, that goods in the hands of [409 Welles belonging to the defendant in the action were adjudged to be delivered according to the custom of the city to the plaintiff in the action, and that "the said John Welles" (the garnishee) "named in the same writ, for that he was summoned and came not according to the custom of the said city, by default was condemned by the foreign attachment aforesaid;" "whereupon, according to the custom of the city," at the instance of the plaintiff, "one of the serjeants-at-mace was commanded to attach *by his body* the said John Welles, and cause him to be led to the prison of the Lord the King," "there to remain until the said John Welles should satisfy the said plaintiff of the said sum." It was not to distrain his goods, not to levy anything upon them, but to attach him by his body.

We have also examples of the form of security given, when submission to the court was not made. There is a precedent of the year 1680, where *Ayliffe* ⁽²⁾ was the name of the garnishee. Hayden the defendant was attached by £20 in the hands of Ayliffe, and Ayliffe, at the suit of the plaintiff, was warned to appear. He appeared and found sureties to have his body from court to court until the end of the plea "ad habendum corpus dicti Thomæ Ayliffe in attachmento, et sic deinceps de curia in curiam, usque ad finem placiti illius." In the case of *Gooch v. Loveland* ⁽³⁾, the proceedings were similar, and the party did not produce his body according to the engagement. Francis

⁽¹⁾ Rolls and Memoranda (A.D. 1443), ⁽²⁾ Returns to Writs, City Archives, A. 70, M. 5. vol. iii, f. 20 b.

⁽³⁾ Returns to Writs, City Archives, vol. i, f. 139 b.

Haddon the garnishee had given as sureties persons named Edney and Lench. The security was "to have, &c." (and no doubt that "&c." means "his body") "from court to court until the end of that plea, &c., according to the custom." Afterwards the garnishee, Francis Haddon, "by and at the instance of his mainpernours aforesaid," (that is his sureties,) "was committed to the prison of the Lord the King in the counter of the Poultry of London, under the custody of us the aforesaid sheriffs, there to remain until the end of the plea of the attachment aforesaid."

These examples show that the custom was, if the garnishee did not appear, to commit him to prison; and, if he 410] did appear, and *time was given for farther proceedings, to take security for his personal appearance from court to court, and if he made any subsequent default, then also to commit him to prison. Commitment to prison is the only way in which, according to the whole course of these precedents, and the findings in the present special case, the garnishee could be compelled to obey; and that, as I have already said, rests upon an intelligible principle. Nothing more need be said to show that such a custom cannot be applied to a corporation, because it fails in this essential and indispensable point, that it cannot, as against a corporation, have the force of compulsion in law.

Upon these grounds, I think, that the judgments under appeal are right, and must be affirmed, and I so move your Lordships.

LORD BLACKBURN: My Lords, I have come to the same conclusion.

I think it necessary to observe, in the first place, upon the way in which the point is raised, in order that it may be seen what the House has really to decide. The declaration in prohibition is on this ground; the plaintiffs in prohibition allege, and truly allege, that they are a body corporate, a corporation aggregate, and they assert that "according to the law of this kingdom of England, the plaintiffs as such corporation as aforesaid are not liable to any process of foreign attachment issuing out of the Lord Mayor's Court," yet the proceedings are taken to enforce a foreign attachment against them, being a body corporate, which the other party threatens to do "by *fleri facias* and otherwise against the goods of the plaintiffs." Such is the declaration in prohibition.

That is met by these pleas. The first plea, denying that they are a corporation is, of course, a mere idle plea. The second says that "the plaintiffs, as such corporation, were

and are liable to the said process, and the said court had, and has, power and authority to attach moneys, goods, and effects of the defendant in the said suit." That is a traverse, raising the question whether the custom does apply to a corporation or not, and that will be of course the main question in the case as raised here. But besides that, the defendants pleaded a special plea, which would be perfectly *good if it had been applied to an ordinary gar- [411] nishee. They plead this custom of foreign attachment in the city, setting it out, as it has been certified often enough, the words of the old certificate being, "If any person found in the city is indebted," and so on. The word "person" might include a corporation, or it might not, that is not expressed, and I shall have to say a word or two about that by-and-bye.

But then they proceed to state the facts, and there is this material averment, "At the petition of the said Sarah Griessell then and there made to such court by her said attorney, and by virtue of such plaint, it was then and there commanded by the said court to one of the serjeants-at-mace of the said mayor, and a minister of such court, that he, according to such custom, should summon the said Thomas Griessell to appear at the same court, so holden before the mayor and aldermen of the said city, to answer the said Sarah Griessell in the plea in such plaint specified, and that the said serjeant-at-mace should return and certify what he should do by virtue of the said precept, that afterwards at the same court the said serjeant-at-mace, according to such custom, returned and certified to the same court that the said Thomas Griessell had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same, and thereupon the said Thomas Griessell was then and there at the same court solemnly called, and did not appear." That is the form of the averment which has been, I think, in all the pleas of foreign attachment since foreign attachment was first pleaded (which is now for 500 years and more), and imperfect as is the security that the defendant should know of the foreign attachment, and that his moneys in the hands of his debtor should not be taken away without notice, there is *some* security there given, namely, that the serjeant-at-mace, a responsible officer, should have tried to find the defendant, that he should not have been able to find him, and that he should not have been able to find anything by which he could summon him. It gives an imperfect security perhaps, but it gives some security that his goods shall not be taken behind

his back, and that security it is, and I apprehend that security alone, which has prevented the custom of foreign 412] attachment from being held to *be utterly unreasonable and void as against a defendant; the reason being that this does give some security, that except in cases where the defendant having been within the city has absconded, leaving nobody to look out for him, and has moreover left no property within the city, that is, not in the hands of another—except in such cases he shall have an opportunity of appearing before the plaintiffs come upon his debtor at all. That is clearly material, and indeed a necessary averment in the plea.

There was a demurrer that plea, and upon demurrer the averment must be taken to be true. The object of the demurrer, no doubt, was to raise the question for the judges of the Common Pleas Division to determine upon what they took judicial notice of, namely, the custom of foreign attachment, whether or no the custom of foreign attachment did apply to a corporation aggregate as garnishee. There is considerable difficulty in saying how that question could be properly raised as the case then stood, I do not say that it might not be, but I say there is very considerable difficulty about it, for although the courts do know and take judicial notice of a great many of the customs of the city of London, and of the custom of foreign attachment in particular, there might be a good deal of dispute as to whether it was not possible that some customs might exist of which the courts had not yet taken judicial notice, and when the case went up to the Court of Appeal on the demurrer, at first, I understand (it does not appear very distinctly on the papers before us how it was) that the late Lord Justice Mellish pointed that out, and said that to raise the real question before the court, it was necessary that the issue of fact, particularly the issue upon the second plea, should be ascertained, or if not necessary, at all events highly desirable that that should be done before they decided the question, and I think he was perfectly right in that. Accordingly it was arranged and agreed that that should be done, and that then the argument should be resumed, and there was an order of reference made to have the matter settled upon the terms which are there mentioned by an arbitrator. That has been done and a special case has been stated. Now it is not expressly stated upon that order what arrangement was made, but it is obvious enough, I think, that the spirit of what 413] was then agreed to was this: that if there *should be any difficulty upon the demurrer to the plea and upon the

plea, both should be amended. They would have been amended of course in every particular that was requisite in order to raise the real question, and if there should be any difficulty as to that, we have to look to the facts as found upon the special case, to see what the custom really was, and accordingly, without any attempt to shrink from it, it has been so argued before us. I do not enter into the inquiry of what amendments precisely might have been required upon the demurrer to the plea, or whether the question was rightly raised upon the demurrer to the plea, or not. I think that is all put aside by this arrangement; and, in fact, the point for your Lordships really to decide, taking the whole matter together, is this, is the custom really established or not? The issue of law would follow the issue of fact, if I may use that phrase. Then are the issues of fact to be found for the defendant or not?

Now, my Lords, when the special case comes to be examined, it appears that upon that particular part of the plea which alleged, what certainly is an essential part of the custom, and was an essential part of the plea, namely, that there had been that kind of notice given to the defendant, or rather that security that the defendant should hear of the proceedings, unless he had run away, or absconded, which would be implied by the serjeant-at-mace trying to find him, and returning *non est inventus*, (and if the serjeant-at-mace returned *non est inventus*, unless it was true, he would be responsible for having made a false return,) upon this essential part of the custom and of the plea it turned out that that had never taken place at all. It appears that a very improper practice has existed for a long while in the city of London. They have been content to write down that these things have been done when they have not been done at all. I will not inquire with what object that was done, or how it came to be done, farther than to say this; whatever may be the case, if a garnishee is defending himself, I cannot doubt at all that the Court of Appeal was perfectly right in saying that that question being raised here, there was no technical estoppel or objection of any sort, and that the point being raised by the garnishee it is conclusive. The plea as pleaded is not proved in an essential part, and consequently *the defendant is entitled to judgment. [414 But then that turns solely upon the particular instance in which it has happened. It does not decide the general question as to the custom.

Now, upon the general question there was an attempt made to argue thus. Mr. Benjamin, if I understood him

rightly, said, as it is shown that in the city of London the authorities have for a long while been abusing this process (for that is what it comes to) therefore the custom must be considered as forfeited and at an end. No authority was cited for such a proposition, and I know of none. There are some authorities for saying that when a body corporate has abused its franchises, those franchises may at the instance of the Crown be seized and treated as forfeited for the abuse; but I have never heard, nor am I aware of any authority for saying, that the fact that many people have abused and made an ill-use of this custom of foreign attachment, and have used it for purposes for which it was not intended, and have probably done a good deal of mischief in so doing; that that fact is to prevent others, innocent persons, from using the custom, if they use it properly afterwards. I do not think, my Lords, there is any ground for saying that.

Then we come to the real question which was intended to be raised, namely, does this custom apply to a corporation aggregate as garnishee? The judges of the Common Pleas Division in giving their judgment, render reasons which are not to my mind satisfactory, that led them to the conclusion that a corporation aggregate could not be a defendant in a court. I do not think it necessary to inquire into that farther than to say, that I do not see any reason why a corporation aggregate cannot be a defendant in a court. I think the decision of the Court of Error in the case of — *v. The Hamburg Company* (') in the reign of Charles II, was a decision that a corporation aggregate could be a defendant. I do not see why it should not. However, it is not necessary now to decide that.

My Lords, assuming it to be convenient and desirable that a natural person, being a debtor to another, should be capable of being treated as a garnishee and having the other's 415] goods attached *in his hands, I do not see that there is anything, in the reason or sense of the thing, why a corporation aggregate being a debtor, should not be treated in the same way. If it be convenient and desirable, for instance, that Messrs. Smith, Payne & Smith the bankers, being natural persons, should have balances in their hands attachable, in order to force their customers to come in, it is equally natural and equally reasonable that the London Joint Stock Banking Company, although a corporation, should also be subject to the same liability. But that is not the question. Customs must be immemorial customs; we must see whether the custom has existed from time immemorial. Be it that we

(') 1 Mod., 212.

are satisfied that the custom would be as good when applied to another subject as to one in which it has existed, we cannot establish that. The Legislature might do so if it pleased, but nobody else can.

Therefore the question comes to be; is the custom here applicable to a corporation aggregate? Two objections are made to that; they are real and substantial objections, upon which I think the whole turns. The garnishee, if he is to be obliged to pay the money, must be discharged from paying it to his creditor. Now the garnishee cannot, according to the authorities, or to reason, set himself free towards his creditor by making any voluntary payment: it must be a compulsory payment; a payment under compulsion of law or else he is not discharged. That brings us to the question, can a corporation aggregate be compelled to pay money in this way? The other way of putting it (the way in which Mr. Harrison put it, which did not strike me at first), really involves the same question. It is of the essence of justice that the garnishee who is called upon to pay for a person, money which is alleged to be due from himself to that person, should have an opportunity of saying "I do not owe the money at all," and should be allowed to plead *nil habet*. A garnishee who is a natural person, can, according to the custom of the city of London, come in and, giving special bail or rendering himself, plead *nil habet*. He is allowed to plead that, and to say "I owe nothing." Can a corporation aggregate do that? That comes round to nearly the same question as this; are the customary processes of the court of the city such as to allow a corporation aggregate being a garnishee, to come in and plead *nil habet*? If *not, any custom which attached to a corporation [416 would be in itself utterly unreasonable and void, and could not be enforced.

Now, upon that, my Lords, the two questions which come before us are really nearly the same in point of fact. I can hardly call it fact; it is a mixture of law which the courts take notice of, and matters proved by old records, and one thing and another; it is therefore a mixture of law and fact: still it comes to be a question, is the process of the appellants by which they enforce obedience to their orders upon foreign attachment, one which is applicable to a corporation? It was argued, or endeavored to be argued, that there was something inherent in a court which enabled it when it made an order to enforce that order. Where it is a common law order, you can enforce the order by the common law processes. Where it is a thing which would not be

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done at common law, but owes its validity to custom, the rule is that it can only be enforced by customary processes. Now, if it were established as a fact (if it could be), that corporations aggregate had been treated as garnishees from early times, so as to establish that they have been from time immemorial treated as garnishees, according to this custom, I should not hesitate to draw the inference that there must have been a process by which they were forced to obey. The custom could not have been applied to them, and they could not have been treated as garnishees from a time to which the memory of man runs not to the contrary, unless there had been some process or other by which corporations aggregate could be compelled to obey a warning given to them, or an order made upon them as garnishees. If it had been established that that had been done, I should draw at once the conclusion that there was such a process. Or, if on the other hand, it was shown as a matter of antiquarian knowledge, or in one way or other made out that there was some process applicable to a natural person—an individual—who was a garnishee, by which he could be compelled to pay, other than by taking his person, if it could be shown that there was some means by which he could be compelled to obey an order, or have his goods taken, other than a *fi. fa.* against him, it would go very far,—I do not say that it would go the whole way, but it would go very far indeed, to make me believe that corporations aggregate which could have 417] *it enforced against them by that kind of process, might also be garnishees. But when one comes to look at this special case, and at all the authorities which have been cited, one finds that neither of those propositions has been made out at all. In the case itself it is stated, and truly stated, “The garnishee” “if he desired to dispute the debt alleged to be due from him to the defendant needed to appear. His appearance, however, was merely for his own protection. Want of appearance on his part did not, as did want of appearance by the defendant in the original action, prevent the plaintiff from getting any farther. From the earliest period, if the garnishee did not appear final judgment went against him by default, with the same consequences as ensued upon judgment after appearance and verdict. Accordingly there is no trace of any process, whether in the nature of *distringas* or *capias*, or otherwise, for the purpose of compelling the garnishee to appear. If he chose to appear, he was obliged to find sureties to be present from court to court until the plea of foreign attachment should be ended, otherwise he was committed to

prison." Could a corporation aggregate do that? Could a corporation aggregate "find sureties to be present from court to court?" Or could a corporation aggregate, if it did not find the sureties, be "committed to prison?" Upon the face of the thing, the statement is enough to show that it could not be so; and consequently it seems to be very plain upon that statement that a corporation aggregate could not come in and plead *nil habet*, because it could neither give the sureties nor go to prison, nor give special bail to render the person to prison which the custom required, and that would seem to go very far to show that the custom could not be applicable to a corporation aggregate.

Then, my Lords, the special case proceeds to say that "in the great majority of instances the garnishee when judgment was given against him handed over the money or goods attached to the serjeant-at-mace without actual compulsion, and the serjeant-at-mace thereupon handed the same to the plaintiff. If the money or goods were not forthcoming, the garnishee might be and ordinarily was arrested and committed to prison. Whether a process in the nature of a *fi. fa.* was also available" (it proceeds to say) "is a matter in dispute," and which, of course, the court *has to [418 determine. But I pause to say that that shows that in the ordinary course, at least, the customary process to compel obedience was one which was not applicable to a corporation aggregate, and such a corporation, therefore, one might say, could not be within the custom, because if it made the payment, it would be a payment not made under compulsion of law, and which, therefore, would not be good as against its creditor the defendant.

Now, the first thing one naturally inquires is what I mentioned before, viz., whether there is any ground for saying that corporations were in fact treated as garnishees from early times. If so I should infer that there must have been some process against them. No corporation seems ever to have been treated as a garnishee, as far as can be found, until, I think, the year 1796, and then, for a considerable period there are entries from which it appears that foreign attachments had been commenced against corporations aggregate as garnishees; but there are no instances of their having been acted upon or obeyed until comparatively recent times. I think the earliest was 1817; it may be as early as that, but most of them were after 1830. Now we know perfectly well that before 1830 the petitioners in the city of London, or I may say the city of London, had been endeavoring to extend the custom of foreign attachment to a degree

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which went outrageously beyond what was justified. Their efforts so to do were hardly put an end to, finally, until the decision in *Cox v. The Mayor of London*(¹). In that case they boldly contended, and the Recorder certified, that it was the custom of the city to sue any person, whether he was in the city or out of the city, for any debt, whether it had accrued within the city or out of the city, and for that purpose to attach any garnishee, whether resident in the city or not resident in the city, if they could catch him within the city, so that the sergeant-at-mace could give him a warning. This House held—and even if it were not the decision of this House I should say no one could read the elaborate opinion given by the late Mr. Justice Willes, which I myself concurred in, as one of the summoned judges, without being convinced that this was a complete usurpation. 419] What I have now to deal with is only *the point that the system of usurpation which was stopped then had begun as early as 1830 or earlier. There are very clear traces of an attempt of the kind having been made in that case which was referred to, *Wetter v. Rucker*(²), where it appears that a Swiss merchant sued an Italian merchant in the City Court of London and, by what looks extremely like collusion, attached a debt in the hands of a common factor. The decision which was then come to, at least the only decision which is material to the present case, was, that payment under that attachment, under the circumstances in which it was made, was not payment by compulsion, and that no other payment would discharge the garnishee. It is therefore a very important authority for the proposition with which I first started, that to make the custom good, it must be shown that there is some process by which the garnishee could be compelled to pay.

I think, therefore, that corporations are not shown to be garnishees, so as to lead to the inference that there must have been some process against them. Has there been, in fact, shown to have been any process against individuals, that is to say natural persons, who are garnishees which could be applicable to a corporation aggregate? I have already said that I think it is essential to show that there is a customary process to enforce an order, which only rests upon the custom itself, a process according to the custom. Has there been anything of the kind? I need not mention all the cases that were referred to, because, as they went on, they were all distinguished from this. The only case which is applicable, if that is applicable, is the case of *Gascoyne*

(¹) Law Rep., 2 H. L., 239.(²) 1 Brod. & B., 491.

v. *Penyke*(¹). That was a peculiar case undoubtedly, in which it is difficult to say exactly what the suit was, but the important part of it as regards this case was that after the garnishee had made final default, judgment was given against him. "Whereupon," says the Recorder, "it is considered that £50 of the moneys aforesaid defended in the hands of the aforesaid John Marian," John Marian was the garnishee—"be levied of the goods and chattels of the same John Marian if he have whereof, &c., and be delivered to the same Torellus by security, according to the custom *of the city aforesaid, &c.; and if the same John [420] Marian have nothing whereof the moneys aforesaid can be levied, that then the same John Marian be taken and committed to prison until he shall have delivered here in court the moneys aforesaid," so that in that case no doubt the court of the city did take upon itself to order a *fl. fa.*, and in the event of no goods being found a *ca. sa.*, in the same breath, and if such a thing as was then done had been done since, and that practice had been followed, so that you could consider whether it was good and reasonable in itself or not, it would be another matter, but to say that such an anomalous and peculiar thing as that should be considered as established, as being part of the custom, because once and once only, rather more than 500 years ago, it was done and has never been acted upon since, seems to me impossible. We are to find the matters of fact as to the custom of the city by the terms of the order, of reference upon the special case. I do not see how one could find as a fact that it was part of the custom of the city to pursue this very anomalous course, which once, and once only, appears to have been pursued 500 years ago. As I said before, the question seems to me to come round to this: Can a corporation aggregate be allowed to appear and plead *nil habet*? If it be so, then a corporation aggregate can only do so upon the terms of giving special bail that the corporation aggregate shall come in person and attend the court, and if not, shall be kept in custody in person; the corporation aggregate cannot come in and plead *nil habet*, and the custom, if it applied to such a corporation, would be utterly unreasonable and void. If the corporation aggregate is to make a payment, that payment will not be good as against the debtor unless the payment is made by compulsion of law, and that comes round to be unless there can be shown to be some customary process applicable to a corporation aggregate, by which it could be compelled to pay. I have already stated, my Lords, that

(¹) Rolls and Memoranda (A.D. 1374), A. 19, Roll 9.

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in my opinion, neither of these things is made out, and consequently I think the judgment should be, as it was given in the Court of Appeal, the judgment of the Common Pleas Division should be affirmed, and this appeal dismissed with costs, without deciding any particular questions as to the special demurrers or causes of demurrer upon the plea, 421] because, as I apprehend, it is taken by arrangement between the parties that the plea demurred to is to be taken as amended so as to raise the question, and that the real question is to be decided upon the facts as found in the special case. Taking that view of the case, I cannot at all doubt that we ought to agree with the judgment proposed by my noble and learned friend upon the woolsack.

LORD WATSON: My Lords, the details of this somewhat complicated case—I mean complicated as presented to the House at the bar—have been so fully criticised by my noble and learned friend on the woolsack that I shall content myself with stating very shortly the reasons for which I concur in the judgment which his Lordship proposed.

The only point, as I take it, that the House intends to decide is that raised by the contention of the appellants to the effect that this custom of the city of London with reference to foreign attachment extends to corporations aggregate as garnishees. In considering the merits of that part of the case it is very necessary to keep in view that which has been already referred to by both my noble and learned friends, namely, that it is of the essence of this custom that execution may follow upon the order directed to the garnishee, in the event of his not obeying that order and failing to hand over the goods of the defendant, or to pay the money of the defendant to the plaintiff. That is necessary, because the courts of law have held that, unless he so deliver or pay under compulsion, he is not discharged. The custom would not be a reasonable one unless it went the length of affording protection to the garnishee when he obeys the order of the court.

Now, my Lords, the older certificates and the treatises upon city law, certainly leave the question open whether corporations are "persons," within the meaning of these laws and those certificates. The word "person" may be extended to legal persons created by statute or by charter, as well as to individuals, and the terms of these documents are not upon the face of them conclusive against the custom or the practice contended for by the appellants. But an examination of these and the older evidence which we have in the present case, I think clearly shows, in the absence of

proof *to the contrary, to which I shall shortly refer, [422 that the custom therein set forth was not applicable to corporations aggregate. It is quite sufficient for that purpose to refer to the two points which have been already noticed ; in the first place, if a garnishee desires to deny his liability as to goods or debt, or, in other words, to plead *nil habet*, the only course of procedure open to him for the purpose of vindicating his rights, was a course of proceeding entirely inapplicable to the case of a corporation. In the second place, I do not think it necessary to go farther than the finding of the case, to the effect that if the garnishee did not pay the money or hand over the goods, the old practice was that the serjeant-at-mace arrested him without any writ of *capias* or warrant—it is not necessary to go farther than that in order to show that the process of compulsion under which alone a garnishee could safely pay, was a process of compulsion which was quite inappropriate in the case of a corporation aggregate.

My Lords, it might no doubt, notwithstanding the inferences that are derived from these facts, be open to the appellants to show that in point of fact corporations were brought within the custom, and that in point of fact execution proceeded against them, appropriate to their personal character as legal persons only. But on referring to the evidence I think it fails, not only in point of time but in point of substance. You have certainly the instances between 1796 and 1817; and, again, a larger practice and more extended custom in recent times, owing to the passing of an act which enabled corporations to create themselves in the year 1844. But, my Lords, the earlier records show a defective practice; there was no compulsion. If payments were made, which is not very satisfactorily shown, by the garnishee, or goods delivered, in those cases it was not under compulsion. A great many of them were withdrawn. And when we come down to more recent times, the only attempt at compulsion which was made by the Court of the Lord Mayor was by issuing a writ equivalent to a writ of *capias*, a proceeding which, as against a corporation garnishee, could obviously have no compulsory force. It therefore appears to me that the attempt to set up this custom as against a corporation aggregate has entirely failed.

But then it was pressed upon your Lordships that this custom *might be extended to corporations aggregate, [423 and that, as it was put by Mr. Webster in his argument for the appellants, execution appropriate to corporations might be found within the court. I do not doubt that it may be

so, but we are here determining, not what may be done, but what has been done: not how this process could be extended to corporations, but whether a custom has existed which does include corporations aggregate.

My Lords, it is not a case, as it was put in argument by the learned Attorney-General, of the creation by law of some new "person" somewhat similar in character to "persons" formerly existing. I offer no opinion as to whether such "persons" would or would not fall within it; but that is not the position of the argument in the present case. Corporations aggregate have existed from a very early period—at least from 1587 downwards. We have in the case before us materials showing that, from that date, individual officers of corporations were made garnishees. Therefore the very same evidence in this case which goes to prove that a custom existed by which individuals were made garnishees, also goes to establish that corporations aggregate in ancient times, and down to a very recent time, enjoyed an immunity from any attempt to bring them within the custom. And, my Lords, it appears to me that to give effect to the argument which was pressed upon us on this point of the case, would be simply to repeal that exemption, and for the first time legally to subject corporations to the operation of this custom by introducing a mode of enforcing the custom which has never been practiced from the earliest times, and not even down to the present time.

Therefore, my Lords, I entirely concur in the views of this case which have already been expressed.

Order under appeal affirmed; and appeal dismissed, with costs.

Lords' Journals, 1st April, 1881.

Solicitor for appellants: *Sir T. J. Nelson.*

Solicitors for respondents: *Clarke, Rawlings & Clarke.*

See 28 Eng. Rep., 788 note; ante, 169 note.

As to effect of a judgment rendered on attachment where the defendant is not a resident within the jurisdiction of the court, and is not personally served therein, see 10 Eng. Rep., 502 note; 15 id., 270 note.

The manner of serving process must necessarily be regulated by every country for itself, and if the State permits process to be served on one of its own citizens by leaving it, in his absence, at his domicile with an adult

member of his household, a foreign tribunal should not refuse to recognize a judgment founded upon it. Otherwise if a foreign judgment against one who owed no allegiance to, and was not subject to the jurisdiction of the State where it was rendered: *Cassidy v. Leitch*, 2 Abb. N. C., 815, 53 How. Pr., 105.

But see *Shepard v. Wright*, 59 How. Pr., 512; *Court v. Clark*, 28 Minn., 539.

Where a defendant desires to plead that the suit was begun by attachment, and he was not personally served with-

in the jurisdiction of the court, he should plead that he was not personally served with process in the action within the State, that he never appeared in person or by attorney in the action, that during the pendency of the alleged action he was not a resident or inhabitant of, or domiciled in the State, or subject to the laws thereof.

A foreign judgment rendered against a citizen of the State in which it is pronounced, stands on a very different footing from a foreign judgment against one who owed no allegiance to, and was not subject to the jurisdiction of the State in which it was rendered: *Cassidy v. Leitch*, 59 How. Pr., 105, 2 Abb. N. C., 815.

But see *Shepard v. Wright*, 59 How. Pr., 512.

A State may adjudge the status of one of its own citizens towards a non-resident, and may authorize to that end such judicial proceedings as it sees fit, but the judgment can have no effect within the bounds of another State, so as to fix upon a citizen of the latter a status against his will and without his consent, which is in hostility with the laws of the sovereignty of his allegiance: *People v. Baker*, 76 N. Y., 78, reversing 15 Hun, 256.

Local legislatures having been established in the English colonies, with plenary powers of legislation, the comity which obtains among nations should be extended to them by tribunals of England, when the law of the colony conflicts with the law of England in respect to acts done within the jurisdiction of the colony. When the right of action in respect to an act otherwise wrongful is taken away before an action has been brought in England, by a law binding where such act was done, no action can be maintained in England: *Phillips v. Eyre*, 9 B. & S., 343, L. R., 4 Q. B., 225, affirmed L. R., 6 Q. B., 1.

As to property within the State, service of process against a non-resident by publication, will give jurisdiction *in rem*: *Pennoyer v. Neff*, 95 U. S. R., 714; *Hart v. Sansom*, 110 id., 151, 154-5.

A State statute which authorizes a personal judgment against a non-resident defendant, upon the service of process on him outside the limits of the

State, is beyond the legislative power, and is null and void.

United States, Circuit and District: *Parrott v. Alabama*, etc., 4 Woods, 353.

The general rule is, that where judgment is rendered in a suit by attachment, against a non-resident of the jurisdiction, the judgment is *in rem* and not *in personam*. If properly rendered, it gives power to satisfy the judgment out of the property attached, but the judgment has no other or greater effect. See article, 4 Vir. L. J., 325.

Iowa: *Lutz v. Kelly*, 47 Iowa, 307.

Kansas: *Iles v. Ellledge*, 18 Kans., 296.

Manitoba: *Schneider v. Woodworth*, 1 Man. L. R., 41.

Maryland: *Hawley v. Donoghue*, 59 Md., 239, 27 Alb. L. J., 465.

Massachusetts: *Wright v. Andrews*, 180 Mass., 149.

Minnesota: *Court v. Clark*, 28 Minn., 539.

New York: *Bartlett v. Holmes*, 75 N. Y., 528, affirming 12 Hun, 398; *People v. Baker*, 76 N. Y., 78, reversing 15 Hun, 256, distinguishing *Kinnier v. Kinnier*, 45 N. Y., 535; *Hunt v. Hunt*, 72 id., 217; *Cheoon v. Wilson*, 9 Wall., 108; *Pennoyer v. Neff*, 95 U. S., 714; *Cassidy v. Leitch*, 59 How. Pr., 105; *Shepard v. Wright*, 59 id., 512; *Gilchrist v. West Va.*, etc., 21 W. Va., 119-123.

But see *Wood v. St. Louis*, etc., 1 Cir. Proc. R., 220, citing *Clark v. Bo-veel*, 21 Hun, 594, and *Pennoyer v. Neff*, 95 U. S. R., 714.

Rhode Island: *Knight v. Clyde*, 12 R. I., 119.

Tennessee: *Barrett v. Oppenheimer*, 12 Heiskell, 298.

United States, Supreme Court: *Pennoyer v. Neff*, 95 U. S., 714; *Hart v. Sansom*, 110 U. S., 151, 154-6; *St. Clair v. Cox*, 106 id., 350.

United States, Circuit and District: *Parrott v. Alabama*, etc., 4 Woods, 353; *Beach v. Mosgrove*, 4 McCrary, 50.

See *Costello v. Costello*, 4 McCrary, 543.

Vermont: *National Bank v. Peabody*, 55 Verm., 492, distinguishing *McGilvray v. Avery*, 30 id., 538.

Virginia: *Gilchrist v. West Virginia*, etc., 21 W. Va., 115.

Suit was brought by attachment in

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Illinois, against a citizen of Missouri, who appeared in the action, and judgment was rendered against him, which was, on appeal, subsequently reversed. The defendant then died, and his administrator in Missouri was made a party and was served by publication. He did not appear, and judgment was rendered against him; held that so far as the estate of the intestate in Missouri was concerned, this judgment was a nullity: *Rentschler v. Jamison*, 6 Mo. App., 135.

If a suit was begun by publication, and judgment entered against a non-resident defendant, without an attachment. The sheriff under an execution issued on the judgment levied on a vessel not within the jurisdiction when the action was commenced or order for publication of the summons was made. Under an order of the District Court of the United States, the vessel was released upon the other part owners giving an undertaking conditioned for her return, or the payment of the value of the interest of the defendant owner. In an action on such undertaking, held that the judgment and execution being void, there was no consideration for the undertaking, and no recovery could be had thereon: *Bartlett v. Holmes*, 75 N. Y., 528, affirming 12 Hun, 398.

A court of another State cannot adjudge the dissolution of the marital relations of a citizen of this State, domiciled and actually residing here during the pendency of the judicial proceedings in such State, without a voluntary appearance on his part therein, and with no actual notice to him thereof, and this, although the marriage was solemnized in such other State. Such a judgment, therefore, is not a defence to an indictment against a citizen of this State for bigamy: *People v. Baker*, 76 N. Y., 78, reversing 15 Hun, 256.

On a judgment recovered in Pennsylvania against two defendants, only one of whom was summoned, there can be no recovery in this State against the defendant who was summoned; the judgment, being a nullity as to the party not summoned, is a nullity as to both. A judgment is an entire thing, and cannot be separated into parts: *Hanley v. Donoghue*, 59 Md., 239, 27 Alb. L. J., 465; *Wright v. Andrews*, 130 Mass., 149.

Where the evidence is conflicting as

to whether defendant was a resident of or served with process in another State, all evidence bearing upon that question is admissible: *Sears v. Dacey*, 123 Mass., 888.

A party for whom an attorney appeared may show such appearance was without his authority, and if jurisdiction depend upon such an appearance, the proceeding is without jurisdiction: 26 Eng. R., 49 note.

Though every intendment will be made in favor of jurisdiction: *Ferguson v. Crawford*, 86 N. Y., 609.

New York: *Ferguson v. Crawford*, 86 N. Y., 609.

North Carolina: *Starr v. Hall*, 87 N. C., 381.

Wisconsin: *Cleveland v. Hopkins*, 55 Wisc., 387.

An appearance by attorney, for the purposes of the motion only, is a special appearance, which has no effect in curing any objection to the judgment for want of jurisdiction over such defendant's person: *Covert v. Clark*, 23 Minn., 539.

Otherwise as to a general appearance on a motion in which the merits of the action are involved: *Curtis v. Jackson*, 23 Minn., 268.

Even though to protect the property of the defendant: *Wright v. Andrews*, 130 Mass., 149.

Ordinarily a judgment *in personam* cannot be rendered against a foreign corporation, unless it appear in the action: *Gilchrist v. West Va.*, etc., 21 W. Va., 115, 119-123.

The court reaffirms the decision in *Insurance Company v. Morse*, 20 Wall., 445, that an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and that a statute of Wisconsin, requiring such an agreement, is in conflict with the constitution of the United States.

A State has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another State, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause.

The legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it

from the State courts to the Federal courts, the Secretary of State should revoke and cancel its license to do business within the State. An injunction to restrain him from so doing, because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, to wit, the prevention of a resort to the Federal courts, is not accurate. The effect of this decision is that the company must forego such resort, or cease its business in the State. The latter result is here accomplished.

As the State has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry: *Doyle v. Continental Ins. Co.*, 94 U. S., 585.

A prohibition by a State that a corporation of another State shall not do business therein, does not prevent such corporation from suing in a national court in the former State, because a State cannot prevent a foreign corporation from suing in such tribunal: *North Western, etc., v. Elliot*, 7 Sawyer, 17.

In an action by a foreign insurance company upon a note given for a policy, if the complaint is silent upon the subject, it will be presumed that such company and its agent had complied with the laws of the State before and at the time the policy was issued, and the note was executed: *Cassaday v. American Ins. Co.*, 72 Ind., 95.

In *Wisconsin* it is held that foreign corporations may maintain suits in the courts of that State upon securities taken on a loan of money, and that foreign insurance companies may take securities therein for debts due them from residents thereof, without complying with the statutory conditions authorizing them to transact the business of insurance in the State: *Charter Oak v. Sawyer*, 44 Wisc., 387.

In an action by a foreign insurance company upon a note given for a policy, if the answer show that the sole consideration of the note in suit was the contract of insurance, and that such insurance company had not complied with the statute of the State in regard to foreign insurance companies, the consideration of the note is illegal and void, and its payment cannot be enforced by law: *Cassady v. American Ins. Co.*, 72 Ind., 95; *Semple v. Bank,*

etc., 5 Sawyer, 88; *Mutual Benefit, etc., v. Bales*, 92 Penn. St., 353; *American, etc., v. Western, etc.*, 67 Ala., 26.

So where the superintendent of insurance has revoked the authority of the company to do business in the State after the giving of the note: *American, etc., v. Stoy*, 41 Mich., 885.

In an action to foreclose a mortgage given to an insurance company of another State, it is a good answer or plea in abatement that the plaintiff has not complied with a statute of the State prescribing certain conditions precedent to its doing business in the State. Such failure does not render the mortgage void, but merely suspends the right to foreclose it until the provisions of the act have been complied with: *Daly v. National, etc.*, 64 Ind., 1.

To same effect: *Singer, etc., v. Brown*, 64 Ind., 548.

In an action by a foreign corporation on a contract made with it, an answer under oath that "the plaintiff had not complied with the provisions of an act of the general assembly" respecting foreign corporations, lacks the precision and certainty of a plea in abatement, and stating not facts but a conclusion only, is insufficient to bar the action: *Singer, etc., v. Effinger*, 79 Ind., 264.

See also *Singer, etc., v. Brown*, 64 Ind., 548.

To an answer alleging the plaintiff to be a foreign corporation and that it had not complied with the law of the State in respect to foreign corporations, a reply which alleged that the article sold was constructed by authority of letters patent issued by the United States, and that the plaintiff had a right to sell notwithstanding any law of the State, is bad on demurrer: *Toledo, etc., v. Work*, 70 Ind., 253.

Foreign corporations are only permitted to do business in this State by comity or consent, express or implied. The legislature has the right to impose such burthens, terms and conditions as it chooses on such bodies before they can do business in the State, or may prohibit them therefrom altogether.

The provision of section 80 of the insurance law, requiring that the net income of insurance companies shall be returned to the assessors for general taxation at the same rate as other property, to be in lieu of all town and

municipal licenses, and the proviso that the provisions of the section shall not be construed to prohibit cities, having an organized fire department, from levying a tax or license fee not exceeding two per cent. on their gross receipts, to be applied exclusively to the support of the fire department, do not subject such companies to double taxation. The sum that may be charged by the cities is in no just sense a tax, but only a fee paid for a license or privilege of transacting business within such cities. The fact that a certain percentage on the amount of the gross receipts is required to be paid instead of a gross sum, for the privilege of carrying on business in a city, does not render it a tax; but this is only an equitable mode of ascertaining the amount of the license fee, and the fact that no permit or license is required to be issued, does not affect the question: *Walker v. Springfield*, 94 Ill., 864.

The provision of the constitution (Art. XIV, § 4), that "no foreign corporation shall do any business in this State without having one known place of business and an authorized agent therein," is a legitimate exercise of the police power of the State, is not in conflict with any act of Congress, nor violative of any provision of the Federal constitution.

A court of equity will not interfere by injunction, at the suit of a foreign telegraph company, to prevent a rival company from obstructing the erection of its poles and wires, when the bill does not show that the complainant has any known place of business or any agent in this State, nor that it has acquired any property or rights of property here.

The Congress of the United States having exercised its power to regulate commerce between the States as to the construction of telegraph lines, no State can directly, or indirectly, by legislative prohibition or otherwise, exclude a foreign telegraph company from doing business within its limits.

The constitutional power of Congress to regulate commerce does not exclude the exercise of a concurrent power by the States, except so far as Congress has actually exercised the power; and no act of Congress is to be interpreted as invading the police powers of the State, unless the intent

is clear and obvious: *American Union Telegraph Co. v. Western Union Telegraph Co.*, 67 Ala., 26.

By failing to comply with the requirements of the Arkansas statute, prescribing the terms upon which insurance companies of other States may do business in that State, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holder.

A statute of Arkansas provides that no insurance company, not of that State, shall do business in the State until it has filed with the auditor a stipulation in writing agreeing that legal process affecting the company, served on the auditor of State, shall have the same effect as if served personally on the company. Held, that if an insurance company does business in the State, and issues policies to citizens of the State on property within the State, that in a suit on such a policy, service of process on the auditor was good personal service on the company, although the written stipulation to that effect was not filed with the auditor; that in such case the company was estopped to say that it had not filed the stipulation, and had not assented to such service: *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123.

Service of a summons upon a non-resident corporation having an office or doing business in this State, in the manner provided by the 4th subdivision of section 3489, Revised Statutes 1879, has the effect of personal service, and gives the court jurisdiction to enter a general judgment.

The legislature has power to pass an act authorizing service of legal process upon any non-resident corporation having an office or doing business within this State, by leaving the same with an agent of the corporation within the State, and authorizing the rendition of a general judgment upon such service: *McNichol v. United States*, etc., 74 Mo., 457.

A foreign insurance company, doing an insurance business in the State of Illinois, may be served with a process of law by service upon any of its agents in accordance with section 5, Practice

Act, and it is not necessary that the service be had upon the agent designated by the company in pursuance of section 23, chapter 23 of the Illinois Revised Statutes, as a person upon whom process may be served.

The statute requiring foreign insurance companies to appoint an agent upon whom process might be served, did not contemplate that service could be had upon no other agent than the one so designated.

A local agent of an insurance company who obtains risks for the company, may be served with process in the name of the company as an agent of the company: *Johnson v. Hanover F. Ins. Co.*, 11 Bissell, 452.

It is not the duty of the commissioner of insurance to prosecute insurance companies or their agents for penalties incurred by them under section 1974 R. S.

Said section 1974 provides that no corporation doing insurance business in this State, against which a final judgment shall have been recorded in any court of this State, shall, after sixty days from the rendition of such judgment, and whilst the same remains unpaid, issue any new policy; and ch. 171, of 1879, requires the commissioner of insurance to revoke the authority of any foreign insurance company to do business in this State, upon its persistent violation of any law regulating such corporations.

Held, that where, after judgment against a foreign insurance company, in a lower court, it has in good faith taken an appeal and given the required undertaking for payment of the judgment if affirmed, it is under no obligation to pay the judgment pending the appeal, and the statutes cited do not apply: *State v. Spooner*, 47 Wisc., 458.

Where the statutes of a State provide that a foreign corporation, as a condition of doing business therein, shall appoint an agent or attorney

within the State upon whom process may be served, and it do so, a judgment rendered upon service upon such agent or attorney is a judgment *in personam*: 15 Eng. Rep., 271 note; 14 id., 441-2 note; 1 Monthly Jur., 331.

Missouri: *McNichol v. The U. S.*, etc., 74 Mo., 457.

New York: *Pringle v. Woolworth*, 90 N. Y., 502.

United States, Supreme Court: *Ex parte Schollenberger*, 96 U. S. R., 369.

See *St. Clair v. Cox*, 106 U. S., 350.

United States, Circuit and District: *Merchants, etc., v. Grand, etc.*, 11 Abb. N. C., 183, 187 and cases cited; *Fonda v. British, etc.*, 6 Cent. L. J., 805; *Moch v. Ins. Co.*, 4 Hughes, 61; *Ehrman v. Teutonia, etc.*, 1 McCrary, 123.

In an action upon a parol contract, an insurance company of one State may be served with process addressed to its home office deposited in the post office in another State where the contract was executed, and by the laws of which consent to such mode of service is made a condition precedent to the company's doing business therein, though such consent be defectively executed: *Distillery Co. v. Ins. Co.*, 12 Amer. L. Rev., 168, 172 and cases cited, 39 or 40 Ohio St. R., —.

See also *Prindle v. Woolworth*, 90 N. Y., 502.

In *Virginia* it is held that in an action against a foreign insurance company doing business in this State, the foreign corporation is *quoad hoc* domiciled in the State by virtue of the statutes authorizing the company to do business there, and is not entitled, under the act of Congress of 1887, to have the cause removed to the United States court, on the ground that the corporation is a resident of another State: *Continental v. Casey*, 27 Gratt., 216.

See also *Ex parte Schollenberger*, 96 U. S., 369.

[6 Appeal Cases, 424.]

H.L. (E.), February 18, 24, 25, 28; March 1, 8; April 7, 1881.

[HOUSE OF LORDS.]

424] *THE REV. ALEXANDER H. MACKONCHIE, *Appellant*; and THE RIGHT HON. LORD PENZANCE and JOHN MARTIN, *Respondents*.

Ecclesiastical Court—Prohibition—Definitive Sentence—Monition—Subsequent Enforcement of the Monition.

In 1874 a suit was instituted by letters of request in the Arches Court, according to the provisions of the 8 & 4 Vict. c. 86 (the Church Discipline Act) against a clerk for unlawful practices in the performance of divine service. A sentence of suspension *ab officio* for six weeks was pronounced against him, and he was "monished" not to repeat the practices. He did repeat them, and was again admonished. He continued to repeat them, was twice summoned before the court to answer, but did not appear; and in June, 1878, the Dean of the Arches "pronounced, decreed, and declared that" the acts alleged to have been done by the clerk, had been fully proved, "and that in so doing he had repeated the offences alleged against him in the articles exhibited against him in this suit," and had thereby disobeyed and contravened the monitions served upon him. "For which disobedience the judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid the judge did farther decree and delcare" that he should be suspended *ab officio et beneficio* for three years:

Held, that this was a matter of ecclesiastical procedure alone, and was not, therefore, the subject of a proceeding in prohibition.

The suspension was only a step in the proceedings which had been regularly instituted in 1874, and was in itself perfectly regular.

Per LORD BLACKBURN: The temporal court, proceeding in prohibition, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters.

Martin v. Mackonochie (1) and *Hobbert v. Purchas* (2) approved.

(1) Law Rep., 3 P. C., 409.

(2) Law Rep., 4 P. C., 301.

[6 Appeal Cases, 460.]

H.L. (E.), May 5, 6, 1881.

[HOUSE OF LORDS.]

460] *WILLIAM DAVIS, *Appellant*; and WILLIAM TREHARNE, *Respondent*.

Mines—Injury to the Surface of the Land.

A clause in a mining lease that the lessee may work the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground works for mining purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people.

Nor did the words that the mining lessee should have liberty to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works, and things upon, in, or under, or above, the said premises, as shall be necessary or convenient for working and carrying away the same," making

compensation, &c., enlarge the power so to deal with the mines as to let down the surface.

Per LORD BLACKBURN: In common right the person who owns the surface has a right to have it properly supported below by minerals. A court of law has to look at the documents to see whether the parties have agreed upon something different from the common right.

APPEAL against a decision of the Court of Appeal, which had affirmed a previous judgment of the Common Pleas Division.

By a lease, dated on the 18th of January, 1865, John Popkin *Traherne demised to Davis certain veins, [461] mines and seams of coal, ironstone, and blackband, being part of the minerals lying under a certain farm and lands called Llwydarth, in the county of Glamorgan, with power to Davis to enter into and upon certain portions of the said farm and lands, and to open, get, and carry away the said veins, mines, &c., for the term of forty years, from the 29th of September, 1865, subject to certain rents and royalties. The lease contained a covenant that Davis would "work the said veins, &c., during the continuance of this demise in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan," and at the end of the term would "compensate the said lessor for any damage or injury done to the surface of the said farm and lands."

By a lease dated in January, 1869, J. P. Traherne granted a part of the farm and lands, together with "the cottage or dwelling house, and outbuildings thereon," to one Thomas Thomas, for a term of ninety-nine years, reserving to himself "all minerals, mines, &c., in or under the said lands, with liberty, power and authority to the said J. P. T., his heirs and assigns, or other persons entitled to the reversion of the said premises, to enter and be upon the said premises to search for, win, and work and carry away the minerals, mines, &c., in or under the land, or in or under any other lands which, or the mines and minerals under which, may for the time being belong to the said J. P. T., and to erect all such buildings, machinery, and things," &c., necessary for the purpose, "he and they making reasonable compensation to Thomas, his assigns, &c., for all damage occasioned by the exercise of the rights hereby reserved." The interest of Thomas became vested by assignment in the respondent, William Treharne.

In July, 1869, J. P. Traherne demised to Davis other seams and veins of coal, &c., lying under the farm and lands referred to, and it was arranged that Davis should surrender

his lease of 1865 and take a fresh lease, which should include the whole of the veins of coal, &c., in the property in question. This was done by a lease for sixty years as from the 26th of March, 1869. The covenants in the lease of 1865 being repeated in the new lease. By a lease of April, 1871, J. P. Traherne demised to the respondent, William Treharne, the other portion of the land, &c., for ninety-nine years, reserving to himself all minerals, &c., in or under the land [462] *thereby demised, with power to J. P. Traherne, his heirs and assigns, or the persons entitled to the reversion, &c., to enter upon the land and search for and carry away the minerals, &c., in or under such land, "and to erect all such buildings, machinery and things, and do and execute all such other acts, works and things, upon, in, or under, or above the said premises, as shall be necessary or convenient for working and carrying away the same; he and they making reasonable compensation to the said William Treharne, his executors, &c., for all damage occasioned by the exercise of the rights hereby reserved."

Thomas had erected on his land a dwelling house, and when William Treharne entered into possession of the additional land, the subject of the lease of 1871, he erected two other dwelling houses thereon. Both the original lease to Thomas and the lease of 1871 contained covenants for the erection of houses upon the land.

In March, 1878, William Treharne, who complained that his land and his houses had been injured by the works carried on by Davis, commenced an action in the Common Pleas Division, claiming damages on that account, and praying for an injunction. The action was tried before Lord Chief Justice Coleridge, at the Swansea Assizes, in August, 1878, when the jury found that the houses had been injured by the subsidence of the soil; that that subsidence was occasioned by the working in the mines, and that it occurred after the 1st of July, 1869. The question of damages was referred to one of the judicial referees, who reported the amount to be £700. It was admitted at the time that the actual working of the mine had been in the usual and approved manner, in which the same was performed in other works of the same kind in the county of Glamorgan. After a hearing, Lord Chief Justice Coleridge directed judgment to be entered for the present respondent, and on the 3d of May, 1880, this judgment was affirmed by the Court of Appeal. This appeal was then brought.

The Solicitor-General (Sir Farrer Herschell) and Mr. Benjamin, Q.C. (Mr. Forbes was with them), for the appel-

lant: The peculiar form of these leases and the rights reserved under them afforded a complete defence to this action. The right reserved to the landlord and his assigns was not in any way *restricted. In *Aspden v. Sed-* [463 *don* (*), under leases with covenants exactly resembling these, the Master of the Rolls refused an injunction to restrain the working of the mines, and his decision was affirmed by the Lords Justices. So in *Eadon v. Jeffcock* (*), the defendants having worked the mine in a proper manner were held free from liability, it being held to be clear there, as on the words of the reservations it was clear in this case, that all the coal was intended to be removed. *Taylor v. Shafto* (*), *Dugdale v. Robertson* (*), *Shafto v. Johnson* (*), *Mordue v. Durham* (*), and *Benfieldside Board v. Consett Iron Company* (*), were referred to and commented on. The case of *Shafto v. Johnson* (*) is particularly strong in favor of the appellants.

Here the terms of the reservation were stronger than in any of the cases. In the lease of 1871, for instance, the reservation was to the lessor, his heirs and assigns, &c., "to do and execute all such other acts, works and things upon, in or under, or above, the said premises as shall be necessary," for working the mines. This reservation specifying both "under and above" must surely include the surface.

There is not, outside this contract, any right to support, *Eadon v. Jeffcock* (*); and the contract itself implies that the support is to be taken away, and provides compensation. If, under the circumstances of this case, any compensation can be claimed, it must be in respect of what was done before and not after the leases of 1869 and 1871.

Mr. *McIntyre*, Q.C., and Mr. *B. Francis Williams*, for the respondent, were not called on.

THE LORD CHANCELLOR (Lord Selborne): My Lords, I believe none of your Lordships has any doubt on this case, and under those circumstances it is not necessary to call upon the learned counsel for the respondent.

*The first question is, whether in the mining lease, [464 which was granted to the defendant Mr. Davis, there was a power, as against the lessor, to let down the surface. My Lords, it appears to me, that there is no portion of the lease

(1) Law Rep., 10 Ch. Ap., 394; 12 Eng. R., 778. But see the case at law on the question of damages, 1 Ex. D., 496.

(2) Law Rep., 7 Ex., 379; 3 Eng. R., 458.

(3) 8 B. & S., 228.

(4) 3 K. & J., 695.

(5) 8 B. & S., 252 n.

(6) Law Rep., 8 C. P., 341; 5 Eng. R., 311.

(7) 3 Ex. D., 54.

(8) Law Rep., 7 Ex., 3 Eng. R., 458, 466, per Baron Cleasby, at p. 388; 3 Eng. R., 466.

which in any way justifies any such conclusion. It is a lease carefully prepared in a form usual in mining leases. It gives the lessee power to work the veins, mines, and seams in the usual way. It gives large surface privileges; it excepts certain mines, veins and seams; and it provides (this is the clause mainly relied upon) that the lessee shall work the said seams and veins of coal during the continuance of the demise "in the usual and most approved way in which the same is performed in other works of the like kind in the county of Glamorgan." It appears from parts of the evidence, and it was not in dispute at the trial, that, subject to the question of the right to let down the surface or to injure the surface by taking away the coals, the actual working of this mine was carried on "in the usual and most approved way" in which such works were performed in other parts of the county of Glamorgan. I assume that in the appellant's favor.

But what does that mean? It refers simply to the mode of carrying on the underground works in the mine; which cannot by possibility, either in the county of Glamorgan, or anywhere, be a custom, or manner, or method of working, without regard to the rights of other persons. It is impossible that those words "the usual and most approved way of working in the county of Glamorgan" can have been intended to absolve the lessee from a legal obligation, collateral to the working of the mine. For this purpose it cannot make any difference, whether the question arises between a lessor who is owner of the surface, and his lessee, or between the lessee and a surface owner who is not lessor. Those words are equally apt, equally effectual, and have the same meaning, in each of those cases. They relate simply to the manner of working the mine for mining purposes; they have no reference to the rights of other persons, which there could not possibly be any local custom in such a district as a county to disregard, and which must be respected in carrying on those works; they cannot be understood to have been meant by either of these parties to signify, that the working must 465] be carried on as if there were no *such rights of other persons, or of the lessor himself, which the lessee was bound to respect.

That point being determined, the case (as was admitted by the learned Solicitor-General) is really at an end; because the other document, the surface lease under which the plaintiff claims, cannot confer any right upon the lessee of the mines. The most that it does is to subject the surface lessee to such

burdens, as, according to its true construction, the lease of the mines imposes on him. I will therefore say no more upon that subject, than that I cannot read the words "or under," which were relied upon, as in any way requiring an implication, that the parties contemplated such underground works as might injure the surface. It appears to me that the powers given by the clause in which those words occur, to "execute all such other acts, works, and things upon, in, or under, or above the premises, as shall be necessary or convenient for working and carrying away the same," (that is, the mines and minerals previously mentioned,) are introduced for a merely subsidiary purpose; and that we must look to the principal words which precede them, to see what were the reserved powers, and for what purposes they were reserved. The previous words have no tendency whatever to show that it was meant to give any power to take away minerals so as to injure the surface.

The last point, which Mr. Benjamin made, I confess appears to me to have nothing in it. The learned judge asked three particular questions of the jury which were answered, and which had reference no doubt to the real issue between the parties, and not to matters which were not in controversy. There does not seem to have been any controversy as to the precise time at which anything was done before 1871, or its precise effect upon the question between the parties. No such question arose at all; and the evidence appears to have been such as really to exclude it. I consider that we are dealing simply with the case of a verdict in favor of the plaintiff, and £700 damages found, not indeed by a jury, but by a referee substituted for a jury; and that there is no ground to infer that any part of those damages was given in respect of any act or matter for which, as between these parties, the defendant ought not to be responsible to the plaintiff.

I therefore move your Lordships to affirm the judgment of the court below, and to dismiss the appeal with costs.

*LORD BLACKBURN: My Lords, I am entirely of [466 the same opinion. I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shown—the burden lying upon those who wish to show it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had

parted with the right of support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and, if there are mineral workings under the surface, to have a proper support left for it by pillars.

The question here arises whether upon these deeds that right of support was taken away. I think wherever there is a lease of minerals granted to a man on the terms that he shall raise the minerals and pay a royalty on the minerals he raises, there is an inducement, an object, on the part of the grantor of the lease to wish to have as much mineral as possible brought out, so as to get a greater benefit in the shape of royalty. If he has the power of controlling the surface, if it is still in his possession or under his control so that he may deal with the surface as he likes, it may be a very prudent thing for him to agree with the person who takes the lease of the mines that he shall raise all the coal whatsoever without regard to whether it lets the surface fall down or not, because the lessor may think that the value of the royalty upon the coals will, to him, far exceed any mischief that may occur upon the surface. Whether he would be right in so thinking or not would depend upon what the nature of the surface was, and what was the value of the minerals below. If it was a piece of moorland pasture lying above some very extensive and valuable coal fields, I suppose nobody would venture to say that he would not greatly prefer to draw the mineral rent and let the pasture go. He would say, Letting the pasture go will not do me a great deal of harm and getting the mineral royalty will do me a great deal of good. On the other 467] hand, I suppose, nobody would doubt *that if a man had the minerals below building land, upon which a very valuable set of buildings in a town had been erected, it would not be good sense on his part to say, I require the mineral lessee to take away the minerals and let the houses come tumbling down; that would be folly. But that is not what we have to consider—that is what the parties had to consider for themselves, namely, was the nature of the property such that it was a prudent and judicious thing to bargain that the mineral lessee should take all the minerals paying a royalty rent upon them and letting down the surface, if such was the consequence; or was it a prudent thing to say that he should take it upon the terms that he was to get all the minerals he could, respecting the right of

support of the surface? Which of those alternatives was the more prudent it was for the parties to consider.

But what I apprehend a court of law has to do is to look at the documents and see whether the parties have agreed upon something different from the common right. If Mr. Treharne, when he let the land, had by express words or by necessary implication said, You may take away all the minerals; or, You must take away all the minerals, letting down the surface, he had a perfect right, at least before he had made the two building leases, to do so. But, whether he has done so or not is a question turning upon the construction of the documents. And when I come to look at the documents, though one is more ready, it being a lease, to believe that the parties meant to say, You shall take all the minerals letting down the surface, than one would have been if it was a sale or a reservation of minerals below to be taken out some future time, I cannot agree with what seems to have been said (I do not know whether that was what was meant) by Mr. Baron Cleasby in the case of *Eadon v. Jeffcock* ⁽¹⁾. I cannot agree that it follows from that that there is not a right of support. I think the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that it is not enough of itself to decide that question.

My Lords, looking at these two documents, I cannot find anything that takes away that right of support. It is quite true that where parties have agreed in this way, you shall make compensation *for whatever injury you do in [468 respect of these rights, and amongst other things you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that, that the lessor says, You may let down the surface. I do not say that it is conclusive, but it is a very strong argument, if you find that clause, to say that he did mean that the lessee might let down the surface. But when you find it said, as it is here, that he shall do certain things underground and a great many things upon the surface, and afterwards make compensation (as it is said in the lease) "for all damage occasioned by the exercise of the rights hereby reserved" or (as it is said in the lease) shall at the end of the lease "compensate the lessor for any damage or injury done to the surface of the said farms and lands" (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), and when we find that those rights

¹⁾ Law Rep., 7 Ex., 379, at p. 388; 3 Eng. R., 458, 466.

do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more, and let down the surface. Yet that is really the whole argument; it stands upon that; that because a clause saying, you shall make compensation for letting down the surface affords a strong argument for saying you may let down the surface, therefore a clause saying you shall make compensation for damage done to the surface affords a strong argument for saying that the lessee might let down the surface. I cannot see that. It does not seem to me to be any argument at all.

As to the last point Mr. Benjamin took, when we come to look at it, I think it would be a monstrous iniquity if we were to yield to it. It appears to me that the real controversy at the trial was whether the damage was occasioned by working out the old Victoria seam long before Mr. Davis, the defendant, had anything to do with the mines, or whether the damage was occasioned by the taking away of certain pillars in the years 1874 and 1875. The two surface leases were in 1869 and 1871. Lord Chief Justice Coleridge, in summing-up to the jury said, and everybody I take it then said, The real question is, was the damage done before 469] *1869 or after? Now it is said that that leaves it open to be a possible thing that it was done between 1869 and 1871. That is clearly against all the contention that was made at the trial, and it would be a monstrous thing if, for such a trifle as that, which it would hardly be using too strong a phrase to call a slip, we were to set aside the verdict.

My Lords, I am clearly of opinion that the judgment is right and should be affirmed.

LORD WATSON: My Lords, I agree with your Lordships in the result at which you have arrived.

When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract; in other words they must express their intention so clearly as to enable a court to say that such intention is plain. I think that rule was laid down by

the late Lord Justice Mellish in the case of *Hext v. Gill* ⁽¹⁾, and I quite agree with that ruling. It may be done in express terms; but of course it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor v. Shafto* ⁽²⁾, where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface.

But, my Lords, applying those principles to the present case, I am quite unable to find in the terms of this mineral lease of July, 1869, anything to countenance the view that the parties did intend to take away from the landlord, who was letting his minerals, the right to have the surface supported. The clauses with regard to working, and the clause with regard to compensation, are clearly not intended to have any bearing upon the question which is now raised. The clause as to working implies no obligation to work any particular seam or to work any particular part of a seam; and there is nowhere in the four corners of this lease [470] any obligation laid upon the tenant to work out the whole of the minerals. I think the conception of the lease shows that it was intended that he should leave workable minerals at the end of his lease, because he contracted to leave the plant and fittings of the mine in good and proper condition; and those numerous stipulations which follow this, which were so largely commented upon by the learned counsel at the bar, were all for the purpose of keeping the mine in proper order, so that the landlord either by self or tenant might enter upon it at the expiry of this lease.

The clauses as to compensation for surface damage would have that bearing if, as was very ingeniously argued by Mr. Benjamin, all those particular things which are mentioned immediately before, had been mentioned as causes of injury to the surface. I cannot so read them. The two things are quite distinct. The one obligation is to leave everything that is necessary for the due working of the mine in proper order at the termination of the lease. The other, which is quite distinct, is an obligation to compensate the landlord for any permanent injury done to the surface of his estate by reason of the operations of the mineral tenant during his working.

Therefore, my Lords, I have no hesitation whatever in holding that the argument addressed to us is ill-founded; and I will only add that it appears to me that every one of those clauses which have been so strongly founded upon,

⁽¹⁾ Law Rep., 7 Ch. Ap., 699; 3 Eng. R., 574.

⁽²⁾ 8 B. & S., 228.

1881

Gibbons v. Gibbons.

J.C.

building: *McCann v. Chisholm*, 2 Ont. R., 506.

Where, in an action to recover for damages alleged to have been caused by defendants' negligence in making alterations in an adjoining building, the evidence is conflicting as to whether

defendants used due care and caution in the work, and whether the mode adopted by them was the usual and proper one, the case should be submitted to the jury: *Smith v. Wagner*, 15 N. Y. Weekly Dig., 264.

[6 Appeal Cases, 471.]

J.C.*, March 22, 23; May 14, 1881.

[PRIVY COUNCIL.]

471] *WILLIAM MATTHEW HUTCHINSON GIBBONS, a Defendant; and WILLIAM MATTHEW HUTCHINSON GIBBONS (the younger an infant, by his guardian), a Defendant.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Construction of Will—Proviso—"Shall be born in my lifetime" construed as Words of futurity.

The testator devised an estate to his six grandsons (of whom the appellant was one) "during their respective lives, in equal shares as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their seniorities in tail male."

By a proviso at the end of the will the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male."

Two out of the six grandsons died without issue. The eldest son of the appellant 472] was born before the date of the will, and by a disentailing *deed executed after the testator's death conveyed to the appellant his share and interest in the said estate in fee.

In a suit for declaration of title and consequent relief:

Held, that the appellant was entitled to an estate in fee simple in one-fourth part of the hereditaments and premises, the subject of the suit.

* *Present*.—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH and SIR ARTHUR HOBHOUSE.

The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity.

Consequently the gift of an estate tail to the appellant's eldest son, who was born before the date of the will, was not revoked.

APPEAL from an order of the Supreme Court (June 22, 1880) affirming a decree of the primary judge in equity (Dec. 5, 1879), whereby it was held that the respondent was tenant in tail of one equal fourth part of the property in question under the will of William Hutchinson, the testator in the cause.

On the 19th of March, 1879, Richard Hutchinson Roberts (the plaintiff in the court below), in the will hereinafter mentioned called Richard Roberts, filed his bill of complaint against the appellant in the said will called William Hutchinson Gibbons (one of the defendants in the court below), and Mackenzie Bowman, Thomas McCulloch, George Hill the younger, Andrew Hardy McCulloch the younger, and Septimus Alfred Stephen, praying that it might be declared that the plaintiff and the said defendants were respectively entitled to the hereditaments and premises called Golden Grove Farm, in the pleadings mentioned, in the parts or shares in the pleadings mentioned, for sale or partition, and for consequent relief.

The proceedings in that suit and the material provisions of the will, as well as the facts of the case, are set out in their Lordships' judgment.

The question in the appeal was whether, according to the true construction of the will and the proviso therein contained, William Kenny Gibbons, who is the eldest son of the appellant, took an estate in tail male in his father's fourth share, or a life estate in remainder after the appellant's death. In the former case the appellant was entitled to an estate therein in fee simple under a disentailing deed executed in his favor by William Kenny Gibbons. In the latter case the respondent claimed that an estate therein in *tail male in remainder vested in him. The primary [473 judge, Mr. Justice Hayman, decreed in favor of the respondent. The Supreme Court (Hargrave and Manning, JJ., Windeyer, J., dissenting) affirmed that decree.

Mr. *Eddis*, Q.C., and Mr. *G. Serrell*, for the appellant, contended that the judgment of the court below ought to be reversed so far as it declared that William Henry Gibbons took only a life interest in the share of the estate in question, and its consequent directions. Under the devise

1881

Gibbons v. Gibbons.

J.C.

building: McCann v. Chisholm, 2 Ont. R., 506.

Where, in an action to recover for damages alleged to have been caused by defendants' negligence in making alterations in an adjoining building, the evidence is conflicting as to whether

defendants used due care and caution in the work, and whether the mode adopted by them was the usual and proper one, the case should be submitted to the jury: *Smith v. Wagner*, 15 N. Y. Weekly Dig., 264.

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Construction of Will—Proviso—"Shall be born in my lifetime" construed as Words of futurity.

The testator devised an estate to his six grandsons (of whom the appellant was one) "during their respective lives, in equal shares as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their seniorities in tail male."

By a proviso at the end of the will the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male."

Two out of the six grandsons died without issue. The eldest son of the appellant 472] was born before the date of the will, and by a disentailing *deed executed after the testator's death conveyed to the appellant his share and interest in the said estate in fee.

In a suit for declaration of title and consequent relief:

Held, that the appellant was entitled to an estate in fee simple in one-fourth part of the hereditaments and premises, the subject of the suit.

* *Present*.—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH and SIR ARTHUR HOBBHOUSE.

The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity.

Consequently the gift of an estate tail to the appellant's eldest son, who was born before the date of the will, was not revoked.

APPEAL from an order of the Supreme Court (June 22, 1880) affirming a decree of the primary judge in equity (Dec. 5, 1879), whereby it was held that the respondent was tenant in tail of one equal fourth part of the property in question under the will of William Hutchinson, the testator in the cause.

On the 19th of March, 1879, Richard Hutchinson Roberts (the plaintiff in the court below), in the will hereinafter mentioned called Richard Roberts, filed his bill of complaint against the appellant in the said will called William Hutchinson Gibbons (one of the defendants in the court below), and Mackenzie Bowman, Thomas McCulloch, George Hill the younger, Andrew Hardy McCulloch the younger, and Septimus Alfred Stephen, praying that it might be declared that the plaintiff and the said defendants were respectively entitled to the hereditaments and premises called Golden Grove Farm, in the pleadings mentioned, in the parts or shares in the pleadings mentioned, for sale or partition, and for consequent relief.

The proceedings in that suit and the material provisions of the will, as well as the facts of the case, are set out in their Lordships' judgment.

The question in the appeal was whether, according to the true construction of the will and the proviso therein contained, William Kenny Gibbons, who is the eldest son of the appellant, took an estate in tail male in his father's fourth share, or a life estate in remainder after the appellant's death. In the former case the appellant was entitled to an estate therein in fee simple under a disentailing deed executed in his favor by William Kenny Gibbons. In the latter case the respondent claimed that an estate therein in *tail male in remainder vested in him. The primary [473 judge, Mr. Justice Hayman, decreed in favor of the respondent. The Supreme Court (Hargrave and Manning, JJ., Windeyer, J., dissenting) affirmed that decree.

Mr. *Eddis*, Q.C., and Mr. *G. Serrell*, for the appellant, contended that the judgment of the court below ought to be reversed so far as it declared that William Henry Gibbons took only a life interest in the share of the estate in question, and its consequent directions. Under the devise

William Henry Gibbons took an estate in tail male. He barred the entail, and conveyed the estate in question discharged therefrom to uses in favor of the appellant in fee simple. The court was wrong in holding that the proviso affected or altered the estate in tail male of W. H. Gibbons. The proviso, on its true construction, and that of the will, only applied to such persons as were born after the date thereof. The plain grammatical meaning of the words "shall be born in my lifetime" should be followed; and they are words of futurity. The judges below seem to rely on a technical rule that "born" and "to be born" have the same meaning, and that, therefore, the words of the proviso include all persons born before or after the date of the will. That rule only applies to words of limitation, when the word "issue" is taken without reference to time, denoting the quality of the estate given, without intending to distinguish between future and existing issue. But in this case the intention and the plain ordinary meaning of the words "shall be born in my lifetime" should be followed; and they are words of futurity. The judges below seem to rely on a technical rule that "born" and "to be born" have the same meaning, and that, therefore, the words of the proviso include all persons born before or after the date of the will. That rule only applies to words of limitation, when the word "issue" is taken without reference to time, denoting the quality of the estate given, without intending to distinguish between future and existing issue. But in this case the intention and the plain ordinary meaning of the words coincide. See Co. Litt. 20 b.; *Hewel v. Ireland* (1); *Doe v. Hallett* (2); *Almack v. Horn* (3); *Re Sheppard's Trusts* (4). The paramount intention of the testator is not to be overthrown by technicalities: *Barnes v. Jennings* (5); *Storrs v. Benbow* (6); *Early v. Benbow* (7), referring to and commenting on *Wilkinson v. Adams*; *Early v. Middleton* (8); *Townsend v. Early* (9); *Wilkinson v. Ad-474*] *am* (10); *Loring v. Thomas* (11). The ordinary *meaning must prevail, for it is not necessary, having regard to the whole scheme of this will, to overrule it. Where there is a clear gift to A., a proviso that in a certain event it is to be cut down must be construed strictly, and such gift will only be cut down by clear and definite words: *Sturges v. Pear-*

(1) 1 P. Wms., 426.

(2) 1 M. & S., 124, 138.

(3) 1 H. & M., 630.

(4) 1 K. & J., 269.

(5) Law Rep., 2 Eq., 448.

(6) 2 M. & K., 46, 48.

(7) 2 Coll., 342, 348; 15 L. J. (N.S.) (Ch.), 169.

(8) 14 Beav., 458.

(9) 8 D. F. & J., 11.

(10) 1 V. & B., 422.

(11) 1 Dr. & Sm., 514.

son⁽¹⁾; *Nunn v. Hancock* ⁽²⁾. Moreover, the will contains several devises of estates in tail male. [Mr. Mackeson, Q.C.: There are twenty-one in the will and three in the codicil.] The proviso must apply to all or none, and the testator must have meant them in their future signification. The interpretation adopted by the courts below would include devisees in tail male previously named: see *Lynch v. Johnson* ⁽³⁾.

Mr. Mackeson, Q.C., and Mr. W. Owen, for the respondent, contended that upon the true construction of the will the respondent took an estate in tail male in the share of the hereditaments in question; and that his father, William Henry Gibbons, took only a life estate therein. The expression "shall be born" is equivalent to "shall have been born," by a technical rule of construction, which must be followed unless there is a clear intention to the contrary. All the children and grandchildren born in the testator's lifetime, whether before or after the date of the will, could take no greater than life estates. The proviso applied to all classes of children, tenants in tail male, born during the testator's lifetime, whether before or after the date of the will. Reference was made to 2 Jarman on Wills [3d ed.], p. 168; *Almack v. Horn* ⁽⁴⁾; *Slingsby v. —* ⁽⁵⁾; *Hebblethwaite v. Cartwright* ⁽⁶⁾; *Doe v. Hallett* ⁽⁷⁾. Again, *Hewet v. Ireland* ⁽⁸⁾ is a strong case to show that where the intention is clear, words with a future signification must accommodate themselves so as to include the past. With regard to the Benbow cases cited on the other side, and also *Townsend v. Early* ⁽⁹⁾, not cited on the other side, they were affirmed in *Townsend v. Early* ⁽¹⁰⁾; but *Early v. Benbow* ⁽¹¹⁾ is the only one in which "shall" or "may" has been construed to [475 mean futurity, contrary to the general intent. Reference was then made to *Loring v. Thomas* ⁽¹²⁾; *In re Chapman's Will* ⁽¹³⁾; to cases where the testator gives an estate with a proviso in case the donee "shall" become bankrupt: *Seymour v. Lucas* ⁽¹⁴⁾; *Yarnold v. Moorehouse* ⁽¹⁵⁾; *Manning v. Chambers* ⁽¹⁶⁾; *White v. Chitty* ⁽¹⁷⁾; *Trappes v. Meredith* ⁽¹⁸⁾; *Wynne v. Wynne* ⁽¹⁹⁾; *Barnes v. Jennings* ⁽²⁰⁾. See also

⁽¹⁾ 4 Madd., 411.

⁽²⁾ 16 W. R., 818.

⁽³⁾ 4 Vic. L. R., 288.

⁽⁴⁾ 1 H. & M., 680, 688.

⁽⁵⁾ 10 Mod. Rep., 398.

⁽⁶⁾ Cas. t. Tal., 31.

⁽⁷⁾ 1 M. & S., 124.

⁽⁸⁾ 1 P. Wms., 428.

⁽⁹⁾ 28 Beav., 429.

⁽¹⁰⁾ 3 D. F. & J., 11.

⁽¹¹⁾ 2 Coll., 342, 348; 15 L. J. (Ch.), (N.S.), 169.

⁽¹²⁾ 1 Dr. & Sm., 497.

⁽¹³⁾ 3 Beav., 382.

⁽¹⁴⁾ 1 Dr. & Sm., 177.

⁽¹⁵⁾ 1 Russ. & My., 364.

⁽¹⁶⁾ 1 De G. & S., 282.

⁽¹⁷⁾ Law Rep., 1 Eq., 372.

⁽¹⁸⁾ Id., 7 Ch., 248; 2 Eng. R., 264.

⁽¹⁹⁾ 2 Keen, 778.

⁽²⁰⁾ Law Rep., 2 Eq., 448.

Davies v. Atkinson (""); Bythewood's Conveyancing, vol. xi, [3d ed.], 880.

Mr. *Eddis*, Q.C., replied.

May 14. The judgment of their Lordships was delivered by

SIR RICHARD COUCH: This is an appeal in a suit brought in the Supreme Court of New South Wales by Richard Hutchinson Roberts against the appellant and five other persons, praying that it might be declared that the plaintiff and the defendants were respectively entitled to certain hereditaments and premises called Golden Grove Farm in the parts or shares in the pleadings mentioned, and that the same might be sold or partitioned, and for consequent relief. On the hearing on the 25th of June, 1879, a decree was made directing a reference to the Master of the Supreme Court to inquire and report who were the parties interested in the said hereditaments and premises, and for what estates and interests, and in what shares and proportions, and whether they were parties to the suit, and that the respondent, the eldest son of William Kenny Gibbons, should be served with notice of the decree.

On the 16th of October, 1879, the Master reported that if under the will of William Hutchinson the testator in the pleadings mentioned, William Kenny Gibbons took a freehold estate in tail male in the said hereditaments and premises, the respondent William Matthew Hutchinson Gibbons, 476] the younger, was not interested, and *had no estate therein, and was not a necessary party to the suit, and the plaintiff and the defendants were the only necessary and proper parties thereto; but if, under the will, William Kenny Gibbons took only a life estate, then the freehold estate in remainder in one-fourth of the hereditaments and premises claimed by the appellant was vested in the respondent, who would be a necessary party to the suit. On the hearing upon further consideration before the primary judge in equity of the Supreme Court on the 5th of December, 1879, a decree was made, declaring that under the will William Kenny Gibbons took only a life interest, and that the freehold estate in remainder in one-fourth of the hereditaments and premises was vested in the respondent, and that he was a necessary party to the suit, and the pleadings were directed to be amended by making him a party as defendant. This was done, and, on the 22d of June, 1880, the cause came on to be heard on the appeal of William Mat-

(¹) 18 W. R., 1016.

thew Hutchinson Gibbons, the present appellant, before three judges of the Supreme Court, when two of them, one being the primary judge, delivered judgment in favor of the respondent, and affirmed the decree and dismissed the appeal. The judgment of the third judge was in favor of the appellant.

The present appeal is from that affirmance.

William Hutchinson, by his will, dated the 20th of December, 1845, among other bequests and devises, devised his estate called Golden Grove Farm, after certain estates which have since determined, as follows:

"To the use of my grandsons, William Hutchinson Gibbons, Mackenzie Bowman, Thomas Ormonde Clarkson, Charles Roberts, junior, William Charles Nicholls, and Richard Roberts during their respective lives, in equal shares and proportions as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail as the share or respective shares which by virtue of this present clause shall have become *vested in him or them, [477 or his or their issue male, to the use of the other or others of my said grandsons during his or their life or respective lives as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively, according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates, messuages, and tenements, hereditaments, houses, and premises to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their respective seniorities in tail male."

The testator also devised many other properties to other persons for life, with remainders to their sons successively in tail male. In many of these devises the words used are "to the use of her (or his) first and every other son successively according to seniority of birth, and the heirs male of the body of such son" (or "in tail male"). In two (to the children of his daughter Martha Roberts) the words are "to

the use of all the children, if more than one, now born or hereafter to be born of the said Martha Roberts by her present husband, in equal shares and proportions as tenants in common in tail, with cross remainders between them in tail." In another part of the will there is a devise of certain property, after the decease of his daughter Elizabeth Bowman, to his grandsons, "Mackenzie Bowman and Frederick Bowman, sons of William and Elizabeth Bowman, for life as tenants in common, and as to the shares of each of them after his decease, to the use of his first and every other son successively in tail male; and on failure of the issue male of one of them the share to go to the other for life, and after his decease to his first and other sons successively in tail male." And this is immediately followed by a devise of other property after the decease of his daughter Elizabeth Bowman "to the use of all the children now born or hereafter to be born of the said Elizabeth Bowman by her present husband William Bowman (excepting her eldest son, the said Mackenzie Bowman, whom I consider I have hereinbefore sufficiently provided for) equally to be divided between them as tenants in common in tail male, with cross remainders between them in tail male." Thus Frederick 478] *Bowman, whom the testator had by name made a devisee for life in the previous devise, was to take by this devise, under the words "the children now born." Then, after a devise of certain property to his daughter Mary Holden for life, and after her decease to her husband John Rose Holden, if he should survive her, for his life, there is a devise of the property "to the use of Thomas Ormonde Clarkson and George Holden, both now residing with the said John Rose Holden and Mary Holden, in York Street aforesaid, and all and every other children or child of the said John Rose Holden and Mary Holden his wife (except an eldest son), to be divided in equal shares and proportions as tenants in common in tail male, with cross remainders between them in tail."

And at the end of the will there is this proviso:

"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment, to the use of the same person respectively, for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively, according to their respective seniorities, in tail male."

The testator died on or about the 26th of July, 1846, and the will was duly proved in the Supreme Court of New South Wales. Thomas Ormonde Clarkson and William Charles Nicholls both died without issue. Mackenzie Bowman has never married, and has been duly found to be a lunatic, and Thomas McCulloch, the committee of his estate, is one of the defendants.

William Kenny Gibbons is the eldest son of the appellant, the grandson of the testator, whom, in his will, he calls William Hutchinson Gibbons, and was born on the 24th of October, 1844, before the date of the will; and, by a disentailing deed dated the 31st of July, 1866, conveyed to the appellant his share and interest in the Golden Grove Farm in fee.

The respondent is the eldest son of William Kenny Gibbons, and claims that under the proviso he is entitled to an estate in tail male in remainder in one-fourth part, and in one-third part of another fourth part, of Golden Grove Farm, and that William Kenny Gibbons is entitled to only a life estate therein.

*Of the two learned judges who delivered judgment in favor of the respondent, one held that the proviso applied to all tenants in tail born during the testator's lifetime, whether before or after the date of his will. The other held that "the expression in the proviso, 'if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime,' might be appropriately applied to classes of unnamed devisees, of whom it would necessarily be uncertain whether those who would be alive at the testator's death might prove to have been born earlier or later, but not so to individuals whom the testator knew to be already in life, and whom he had specially singled out for remainders in tail." Both appear to have thought that the will must be construed as speaking at the testator's death, in which they were clearly mistaken.

The decision in this appeal depends upon the construction of this proviso. The learned counsel for the respondent contended that the words "shall be born in my lifetime" had a technical meaning, and must be construed so as to include all persons born before or after the date of the will, and they further contended that the general intention of the will was to extend the rule of perpetuities to its utmost extent; and that all persons born in the testator's lifetime were to have life estates only. But their Lordships do not accede to this view. Where indeed the word "issue" is a word of limitation it may be said that expressions coupled

with it and pointing to future births receive a technical construction. In that case there is no gift to the issue; the mention of issue only operates to designate the quality of the interest given to their parent, and the distinction between future and existing issue altogether disappears. It is quite different when there is a direct gift to the issue. In that case the only rule of construction applicable is the common one, that words are to have their natural signification, and that legal and technical words are to have their legal and technical signification, unless there be something in the context of a particular instrument to show the contrary.

As Vice-Chancellor Kindersley says in *Loring v. Thomas* ⁽¹⁾ where the words were "shall die," "The question is 480] really one of *intention, whether the testator intended to make the gift by way of substitution of the issue only of those who are living at the date of the will, or to include the issue of any predeceased child; and, of course, this intention can be taken from the language of the will." In cases of substitution an intention is implied on the face of the will that "if the precedent limitation by what means soever is out of the case the subsequent limitation takes place:" *In re Sheppard's Trust* ⁽²⁾. But in this case the object of the proviso is to cut down certain definite gifts, and this is not to be done unless the intention is clearly expressed: *Sturges v. Pearson* ⁽³⁾. In the case of a proviso to take effect on the legatee becoming bankrupt, words of futurity are not allowed to operate to defeat the manifest intention of the testator, that the gift shall be a personal benefit to the legatee: *Trappes v. Meredith* ⁽⁴⁾.

Numerous cases, to which it is unnecessary to refer, have undoubtedly decided that the words "shall be born," in the absence of any context to explain them, are to be taken as words of futurity. But they have not a technical meaning, except in the case before mentioned, and their construction in other than the ordinary meaning depends upon the intention. It cannot be presumed in this case that the testator's intention was that all persons born in his lifetime were to have life estates, since he has given an estate tail to two persons by their names in the will, and to another who, though not named in that devise, had been named in a previous one. Indeed, it was allowed in the argument that the testator did not intend to include named persons, or any one of whose existence he knew. Thus, if the respondent's construction be adopted, an exception would have to be

⁽¹⁾ 1 Dr. & Sm., 523.

⁽²⁾ 4 Madd., 411.

⁽³⁾ 1 K. & J., 276.

⁽⁴⁾ Law Rep., 7 Ch., 248; 2 Eng. R., 264.

introduced into the proviso after the words "any person." Again, the proviso is confined to tenants in tail male, and thus could not affect the devise to the children of Martha Roberts, which is contrary to the supposed intention. It results therefore from a consideration of the several devises that no such general intention as has been contended for can be collected from the will, and the words of the proviso must therefore be construed according to their grammatical sense, and be taken to mean a tenant in tail male born after *the date of the will. Arguments founded upon the [48] supposed general intention of a testator require to be carefully watched. This was pointed out by the Lord Chancellor in *Giles v. Melsom* (*). He says: "I am led to follow the argument as to the general scheme of the will. It is, I venture to say, a perilous and hazardous argument in most cases where it is used. I do not say that there are not cases in which it may be properly used, but certainly it is an argument which seeks to escape from the necessity of grappling with the meaning of particular words upon grammatical principles, and endeavors to get into a region of speculation as to the probable intent of the testator."

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the Supreme Court, dated the 5th of December, 1879, so far as it declares that under the said will of William Hutchinson the said William Kenny Gibbons took only a life estate in the hereditaments and premises the subject-matter of the suit and that the freehold estate in remainder in one-fourth part of the said hereditaments and premises claimed by the defendant, William Matthew Hutchinson Gibbons, was vested in the said infant William Matthew Hutchinson Gibbons the younger, and that he was a necessary party to the suit, and the order of the said court on appeal dated the 22d of June, 1880, affirming the same and dismissing the petition of appeal therein mentioned; and to declare that the said William Kenny Gibbons took an estate in tail male in the said one-fourth part of the said hereditaments and premises, and that the said William Matthew Hutchinson Gibbons is now entitled to the same in fee simple. The costs of the appellant and respondent of this appeal, being taxed as between solicitor and client, will be paid out of the *corpus* of the share to which the appellant, the said William Matthew Hutchinson Gibbons, is declared to be entitled.

Solicitor for appellant: *P. J. Gordon.*

Solicitor for respondent: *F. W. Denby.*

(*) *Law Rep.*, 6 H. L., 31; 4 Eng. R., 110.

[6 Appeal Cases, 482.]

J.C.*, November 20, 1880.

[PRIVY COUNCIL.]

482] *JOSEPH PITTS, *Appellant*; and EDWARD LA FONTAINE, Trustee in Liquidation of the Affairs of T. B. Morton & Co., *Respondent* (').

ON APPEAL FROM THE SUPREME CONSULAR COURT, CONSTANTINOPLE.

Practice—Effect of Order of the Queen in Council—Trustee's Liability for Costs.

When a decision of the Judicial Committee has been reported to Her Majesty and has been sanctioned it becomes the decree or order of the final Court of Appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

A trustee in bankruptcy can be made personally liable for costs of a suit to which he is a party, subject to the Court of Bankruptcy allowing him to recoup himself out of the bankrupt estate, if his conduct has been *bona fide*.

**Present*.—SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(') See S. C., 31 Eng. R., 809.

[6 Appeal Cases, 489.]

H.L. (Sc.), March 7, 1881.

[HOUSE OF LORDS.]

BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.

489]

*DYSART PEERAGE CASE.

Irregular Scotch Marriage—Habit and Repute—Mutual Consent de presenti before Witnesses.

The law of Scotland accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of Scotland.

Cohabitation outside Scotland will not constitute marriage, although it may be competently founded on, either as corroborative evidence of a ceremony in Scotland, or as evidence that a ceremony proved to have taken place in Scotland was truly intended by the parties as a present interchange of matrimonial consent.

A. alleged that she was lawfully married to B. by interchange of mutual consent *de presenti* before witnesses in 1844 in Scotland, and that having remained in Scotland for about a month, B. and she cohabited at divers places in England as husband and wife, and that a son now living was born of the marriage in 1863.

Between 1844 and 1849, when B. deserted A., three daughters were born, one of whom B. registered as legitimate. In 1851 B. married C. at a parish church in England and had children. A. was informed of this marriage shortly after its celebration, but took no steps to have the validity of the averred irregular Scotch marriage of 1844, or the nullity of the marriage of 1851, judicially declared, until 1880. The alleged witnesses to A.'s marriage were admitted now to be dead, but they were

alive in 1853, when they might have been judicially examined in an action brought against B. for the board and lodging of A. :

Held, that the evidence completely disproved the allegation of a marriage between A. and B.

B. married C. *in facie ecclesie* in 1851, had issue, and died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness *gave evi- [490] dence that B. told him repeatedly after 1851 that A. was his wife and not C. :

Held, that such evidence was not admissible.

Effect of the statute 37 & 38 Vict., c. 64 (1874), *held* not necessary to decide.

In an attempt on the part of A. to set up an irregular marriage according to the law of Scotland between herself and B., statements prepared by D., the plaintiff, in an action against B. as the alleged husband of A. for A.'s board and lodgings: which statements were signed—and in one case corrected by interlineations—by deceased persons who, if alive, would have been competent witnesses, were sought to be used as evidence :

Held, that they were not admissible.

LIONEL WILLIAM JOHN, 6th Earl of Dysart, died on the 23d of September, 1878. His only son William Lionel Felix, Lord Huntingtower, predeceased him on the 21st of December, 1872. Lord Huntingtower married on the 26th of September, 1851, at East Horrington church in the parish of St. Cuthbert Wells, county Somerset, his cousin Katherine Elizabeth Camilla, daughter of Sir Joseph Burke, Bart. Of that marriage there has been born, three daughters and one son. The son, William John Manners, on his father's death, assumed the curtesy title of Lord Huntingtower, which he bore until the death of his grandfather, after which date he answered to the title of Earl of Dysart, and exercised as said earl the right to vote at the nomination and election of peers of Scotland to vote in Parliament. But being desirous that the allegations of one Elizabeth Ackford, calling herself the widow of the late Lord Huntingtower, should be set at rest, he presented this petition to Her Majesty, praying Her Majesty to be graciously pleased to admit the petitioner's succession to, and to declare that he is of right entitled to, the titles, honors, and dignities of Earl of Dysart and Lord Huntingtower in the peerage of Scotland. That petition was referred by Her Majesty in July, 1880, to the House of Lords, and by that House to this Committee.

On the 3d of August, 1880, a petition was presented to the House by a lady styling herself Elizabeth Dowager Lady Huntingtower, praying that counsel might be assigned her, and that she might be allowed to appear and be heard on behalf of her infant son, Albert Edwin, in opposition to the claims of William John *Manners as Earl of Dysart [491] and Lord Huntingtower. She was ordered to lodge a printed case, and counsel and agents were assigned to her. She accordingly lodged a printed case and led evidence in

support of it. She averred in her case that (1.) she, "in the month of July, 1844, and at Grecian Cottage, Trinity, near Edinburgh, in Scotland, and by interchange of mutual matrimonial consent, *per verba de præsenti*, was lawfully married, according to the law of Scotland, to the late William Lionel Felix, Lord Huntingtower; (2.) that afterwards she "and the said Lord Huntingtower cohabited together as husband and wife, and were habite and repute husband and wife;" (3.) that her "infant son Albert Edwin Tollemache, being the only surviving son of the said marriage, is the person entitled" to the titles, honors, and dignities in question.

Her case, *inter alia*, also stated that she was the daughter of Henry Acford, a freeman of the town of Bideford, Devonshire. But owing to a serious accident which befell her father, rendering him a cripple for life, she was compelled to earn her own livelihood. In 1843 she was in the service of the Rev. C. W. Scarth, at Bathwick Rectory, Bath, as housekeeper. Near the end of 1843, she had given notice to leave, when she received a letter purporting to come from Lady Dysart, who had often called to see the Rev. Mr. Scarth at the rectory, asking her to go to a certain house in reference to a situation as lady's maid and companion to Lady Dysart. She accordingly went to the house directed, and there saw a gentleman who told her he was to engage her on the part of Lady Dysart, that Lady Dysart knew her and did not require any recommendation, that she was to go to a house at Southstoke, a residence about five miles from Bath, and engage servants; and that Lady Dysart intended to reside there as soon as the servants were engaged. Lady Dysart did not appear, but Lord Huntingtower visited the house, and after a time one evening came to her sitting-room and took hold of her hands saying he was madly in love with her, and that he would marry her at the parish church. She told him she was engaged, and succeeded in getting away from him. A few nights afterwards she alleged Lord Huntingtower burst open her bedroom door, which was locked, and after a very violent struggle, in which she *was much injured about her person, he had connection with her by force and against her will. She was very ill, and Lord Huntingtower told her that if she would go to London he would marry her at a registrar's office, and to this, after some hesitation, she consented.

Lord Huntingtower went to London, and wrote to her begging her to follow him to be married to him. She went,

and slept one night alone at the London Bridge Hotel under the name of Miss Acford.

Next day she went to some rooms in Berkeley Street. The petitioner was so ill that she was ordered to go back to her father's house in Devonshire. She accordingly left London for her father's home and remained there three or four weeks; whilst there Lord Huntingtower wrote to her most affectionate letters, imploring her to return and that the marriage should be carried out. She returned to London about February, 1844, and from there Lord Huntingtower—she still being very ill—took her to Hayling Island, and they both stayed at Crosse's Hotel. After some days Lord Huntingtower took a furnished house, and they went there. She became much worse in health, and Lord Huntingtower wanted to obtain a special license, but she was too ill to go through the ceremony. After a time she and Lord Huntingtower returned to London and remained a fortnight at Middleton or Maryland Square. She was obliged again to leave London and go back to her father's. There she remained till June, 1844, during this time she received letters from Lord Huntingtower urging her to return to London, and promising that if she did he would take her to Scotland and make her his wife. Relying on these promises she again came to London, and was taken by a Mr. Kenrick, a friend of Lord Huntingtower, to his own house, to meet Lord Huntingtower. Mrs. Kenrick, afterwards Mrs. Stegall, received her. Apartments were taken for her in Trevor Square and the Scotch marriage was frequently discussed. Lord Huntingtower often at this time discussing with Mr. Kenrick the subject of Scotch marriage. Lord Huntingtower then went to Scotland to arrange about his marriage with the petitioner. After some days Lord Huntingtower returned to London, and pressed the petitioner to go along with him to Scotland, where *he stated he had ascer- [493
tained they could be married without ceremony. The petitioner refused to go with him, but agreed to follow him. Lord Huntingtower then went to Scotland, and it was distinctly understood before he left that the purpose of his going to Scotland was to make arrangements there to receive the petitioner and to marry her there and to make her his lawful wife in such way as the law of Scotland allowed.

The petitioner after hearing from Lord Huntingtower left by steamer from Blackwall, Mr. and Mrs. Kenrick seeing her off, whence she arrived at Granton, near Edinburgh. Lord Huntingtower's man servant, Frederick Spicer, met her with a carriage and drove direct to a house called the

Grecian Cottage, Trinity, near Edinburgh. Lord Huntingtower received the petitioner on the lawn, they then went inside the cottage, Lord Huntingtower called in Spicer, and told him he wanted him as a witness. Lord Huntingtower then, in Spicer's presence, laid his hand on the petitioner's shoulder and declared and acknowledged her to be his lawful wife, and present matrimonial consent was there interchanged and expressed between the petitioner and Lord Huntingtower. The petitioner thereupon believed that she was then lawfully married according to the law of Scotland. Lord Huntingtower intended her to believe and also himself believed that the petitioner then became his lawful wife. Afterwards, on the same day, Lord Huntingtower placed on the petitioner's finger a wedding ring. At the time of the said declaration Spicer was the only servant in the house, but a female servant named Margaret Ritchie—afterwards Mrs. Bremner—came on the following morning. A few days after a letter was received from Lady Dysart, to whom Lord Huntingtower had written stating that he had taken the petitioner to Scotland and the purpose for which he had taken her there. In that letter Lady Dysart called him a fool, and stated that he could never marry again, and must ever afterwards call the petitioner his wife. Lord Huntingtower read a portion of this letter to the two servants Spicer and Ritchie, and again declared and acknowledged the petitioner to be his wife, in the petitioner's presence and with her consent.

The case also stated that Lord Huntingtower said to a policeman named Horne that the petitioner knew but little 494] of Scotland as *she was on her marriage tour. They remained at Grecian Cottage from three to four weeks. From there they went to Newcastle-on-Tyne, and stayed at the hotel where the coach stopped. There they were known as Mr. and Mrs. Tollemache. On the following morning they drove to Tynemouth and stayed at the Bath Hotel.

Lord Huntingtower went on in advance to London, and the petitioner followed him. While they were in London Lord Huntingtower gave a dinner at Greenwich in celebration of the marriage. There were six or eight persons present, including Lord Huntingtower, the petitioner, and Mr. Kenrick.

“From the time of the marriage at Grecian Cottage, down to October, 1848, Lord Huntingtower and the petitioner lived and cohabited together at divers places in England as husband and wife, and were recognized and treated as such by all those with whom they came in contact. Lord Hunting-

tower and the petitioner generally went at those places by the name of Tollemache or Talmash, and on one occasion by the name of Langford."

The petitioner's first child was born on the 10th of September, 1845, and was registered by the petitioner as the son of William Felix Lionel Tollemache and Elizabeth Tollemache, formerly Acford.

Mrs. Toone, the mother of Lady Dysart, was very kind to the petitioner until her death in 1848, and on one occasion sent her £50 sewn between the leaves of the petitioner's housebook.

The second child, a girl, was born at 4 Manor Street, Clapham. Lord Huntingtower himself registered this child as born in lawful wedlock. He signed himself "W. L. Talmash," giving the mother's name as Elizabeth Talmash, formerly Acford.

After this they lived at various places—Greenwich, at Walton-on-the-Naze, at Miss Pottle's, Kennington Lane, Kennington, and at Camberwell, and subsequently at Mr. Cadman's at Southend.

At Greenwich they were frequently visited by General Harrison, a Mr. Johnson, a barrister, a Captain Corty, and others. At Southend a third child, a girl, was born on the 14th of January, 1848. The father's name was given as William Lionel Felix Talmash, Lord Huntingtower, and the mother's as Elizabeth Talmash, formerly Acford. The petitioner registered this child herself.

At Southend there was a quarrel between them, and Lord *Huntingtower, she alleged, took away from her by [495 force the letters she had received from him, including the letter received from Lady Dysart by Lord Huntingtower, these letters she believed he destroyed. He had previously put some of these letters in her hands telling her to keep them, for they contained facts relating to her marriage. From Southend, in February, 1848, they went to Miss Pottle's, Kennington Lane, and from there went to various other places, Lord Huntingtower being pressed for money. Eventually, in August, 1848, they returned to Miss Pottle. In October of that year Lord Huntingtower took possession by force of another parcel of letters which he had written to her as his wife, and which also related to their marriage in Scotland. He then deserted her.

Miss Pottle brought an action against Lord Huntingtower in the Bromley court for the petitioner's board and lodging, and recovered the amount claimed. The petitioner believed

she was subpoenaed, and gave evidence in the name of Huntingtower or Tollemache.

After this she and her children suffered great privations, and after a time she wrote to Lady Dysart, who replied that she must call herself by the name of Ackland, otherwise she would not correspond with her, or help her in any way. As she and her children were absolutely destitute she was obliged to conform to this request. Lady Dysart supported her for some time; but on her refusing to go abroad Lady Dysart ceased to give her any assistance whatever. She applied to the Lambeth guardians for assistance; they, by their solicitor, commenced proceedings against Lord Huntingtower, but the solicitor died and nothing further was done. In 1850, Mr. Jarrett, the relieving officer of Lambeth, took the petitioner and her children to his own house and provided them with food and lodging for nearly two years. He brought an action in 1853 against Lord Huntingtower for their board and lodging. The court refused to allow her to be a witness. Mr. Jarrett could not afford the means to bring forward witnesses from Scotland and elsewhere, and the action was unsuccessful.

While the petitioner lived at Mr. Jarrett's she was informed for the first time of Lord Huntingtower's marriage with his cousin, Miss Burke. After Jarrett's action in 1853, the 496] petitioner called *at Ham House, where she first saw Lord Huntingtower after his marriage with Miss Burke, and a painful scene ensued.

In 1854 Lord Huntingtower's solicitor prepared a deed of covenant in which the petitioner was described by her maiden name, Miss Acford, and as a single woman, and by which an annuity of £60 was paid to her, on the stipulation that all letters of Lord Huntingtower should be given up. The petitioner signed this deed as she was in destitute circumstances, Lord Huntingtower at the same time assured her that she was his true wife, and that by her signing it she would not invalidate her marriage. In 1857 this deed was varied by an agreement which Lord Huntingtower brought with him to the petitioner to sign. She signed this also in her maiden name.

After this agreement Lord Huntingtower placed the petitioner's two eldest daughters at Norwood. From that time Lord Huntingtower, as her husband, visited the petitioner, and had intercourse with her from time to time. On the 4th of April, 1858, the petitioner gave birth to a son of whom Lord Huntingtower was the father. This child died the same year. In 1862 Lord Huntingtower still continued to

visit her, and on the 15th of February, 1863, she gave birth to a son, Albert Edwin Tollemache, on whose behalf the peerage is now claimed, of which son Lord Huntingtower was the father.

The annuity was not paid with regularity, and in 1865 the petitioner brought an action against Lord Huntingtower, at Maidstone, to recover a part of it, and Lord Huntingtower pleaded that the petitioner was his wife, and the verdict passed for the defendant on that plea. The solicitor for the petitioner ultimately effected a compromise of the matter, and the amount sued for was paid. At various times from 1862, Lord Huntingtower urged the petitioner to institute proceedings for a divorce from him, on the ground that he was living in open adultery. At this time Lord Huntingtower had left the lady he married in 1851, and was living with a woman of the name of Dibble.

July 30, Aug. 3, 1880, and Jan. 21, 24, 25, Feb. 7, 21, 22, 1881. *Sir John Holker*, Q.C., and Mr. *W. A. Lindsay*, and Mr. *Badenoch Nicolson*, appeared for William John Manners (Earl of Dysart).

*Mr. *Shiress Will* was counsel for the petitioner, [497 styling herself Elizabeth Dowager Lady Huntingtower.

Sir Henry James, A.G., *The Lord Advocate* (Right Hon. J. M'Laren, Q.C.), *The Solicitor-General for Scotland* (Mr. J. B. Balfour, Q.C.), and Mr. *Crawford*, appeared for the Crown.

On the 21st, 24th, and 25th of January, 1881, the petitioner, claiming to be the widow of the late Lord Huntingtower, was examined.

Her examination in chief and her admissions and contradictions in cross-examination, will be found fully set out in the opinions of the Law Peers⁽¹⁾.

General Harrison said he was introduced to the petitioner in 1847, as Mrs. Tollemache. Lord Huntingtower, with whom he was most intimate, told him, one day they were speaking about committing rapes, that "he had the greatest fight with this Lizzie of his to take her, and that he should not have succeeded if he had not promised to marry her, and to quiet the matter up he took her into Scotland for that purpose."

Mrs. Steggall, formerly Mrs. Kenrick, said, that the first time she saw the petitioner Lord Huntingtower introduced her as his wife, saying "We have only been married in the country two or three days before I came up to London,"

⁽¹⁾ *Post*, p. 569, *et seq.*

and she never remembered Lord Huntingtower speaking about Scotland, but she admitted her memory was very bad; and the Lords refused to allow her to refresh her memory by a letter written since this controversy arose.

It was admitted that Frederick Spicer was dead, but he was proved to have been alive and in communication with Jarrett about the time his action was brought against Lord Huntingtower.

A witness, first cousin to Lord Huntingtower, was about to give evidence that Lord Huntingtower between 1860 and 1864, had frequently told him that Acford was his wife and not Katherine Burke.

Sir John Holker objected to these statements being admitted, as they were not part of the *res gestæ*. They were statements not admissible, because they were made *post 498] litem motam*, and made *by Lord Huntingtower tending to invalidate a marriage subsequently contracted by him *in facie ecclesiæ*, and to bastardize his issue. Hearsay evidence, as a general rule, was admitted by the law of Scotland, but precognitions were not, *Graham v. Western Bank of Scotland* (*) and *Macdonald v. Union Bank* (*), on the ground that they were not spontaneous and therefore could not be relied on. On the same principle he submitted that the statements of interested persons, or persons self discredited as setting up a prior marriage, should be excluded.

The Lord Advocate referred to the acts 16 & 17 Vict., c. 20, and 37 & 38 Vict., c. 64, as showing that until 1874 a party to a matrimonial cause could not be examined as a witness in Scotland. A person who had contracted a marriage *in facie ecclesiæ* was not by the law of Scotland allowed to prove a previous irregular marriage; the only case in which hearsay evidence of a statement by a deceased spouse as to a marriage having taken place had been received was in *Steuart v. Robertson* (*).

He contended that the only effect of the act 37 & 38 Vict., c. 64 (1874), was to enable the court to receive direct such statements of the spouses as they could previously have received through the medium of other persons, and that it could not have been intended to permit a person to disclaim a lawful marriage by giving evidence of a prior marriage *per verba de præsentî*.

Mr. Shiress Will contended that the whole conduct of the

(*) Court of Sess. Cas., 1st Series, vol. iii, p. 617.

(*) Court of Sess. Cas., 3d Series, vol. ii, p. 963.

(*) Law Rep., 2 H. L., Sc. 494.

parties alleged to have been married, including their letters and statements, were admissible in support of a marriage *per verba de presenti*. Although in *Longworth v. Yelverton* (1) hearsay evidence of a statement of the alleged husband had been tendered after his death and rejected, it had not been rejected upon the grounds upon which the present objection was rested. Assuming the alleged marriage to have taken place, the fact of Lord Huntingtower having gone through another ceremony of marriage afterwards could not deprive the person whom he had previously married of the benefit of any statements he afterwards made, *tending to prove the previous marriage. The only [499 effect of the act 37 & 38 Vict., c. 64, was to make the evidence of one of the parties admissible in an action arising in consequence of a divorce.

The Law Peers delivered the following opinions upon this point:

1881. Feb. 7. LORD SELBORNE, L.C.: We consider this evidence to be inadmissible. We have admitted the *res gestæ* between the parties, upon the principle that whatever actually took place between them ought to be considered. If Lord Huntingtower, at the time when these alleged declarations were made, would have been a competent witness by the law of Scotland, then the rule of the law of Scotland might have come in, which admits proof of the statements, not on oath, of a competent witness after his death. But during the whole of his lifetime Lord Huntingtower was an incompetent witness. The cases to which Sir John Holker has referred with regard to precognitions, show, that even when a man might have been a competent witness, and when hearsay evidence as to a deceased person might be admitted, still the courts are on their guard against extending the application of that which is, after all, an exception to general rules, to new cases, where the declarations sought to be proved have been made under circumstances tending to deprive them of the weight of spontaneous and voluntary declarations. I do not say more about it, because it may be that we may have to hear more upon the question of precognitions afterwards (2).

Then, Lord Huntingtower not having been a competent witness, the only question which remains is whether, that being so, he could bind the parties to this proceeding, and create evidence against them, by his admissions made at the time when they are said to have been made, that is, after

(1) Law Rep., 1 H. L., Sc. 218.

(2) See p. 507.

the status and interest, whatever it be, of these parties, had come into existence by a solemn and formal marriage contracted with Miss Burke by Lord Huntingtower in the face of the church. Now it is beyond controversy that if such admissions had been actually made by Lord Huntingtower on record judicially they would not have been received. 500] *Admissions made elsewhere under such circumstances, though they might have been evidence against himself upon principles which have been acted upon in a great number of cases, cannot possibly be evidence to disprove the validity of the marriage with Miss Burke contracted in the face of the church, or to destroy the legitimacy of her children. It is not Lord Huntingtower that we are dealing with now, but another person. It appears to me that the principle upon which we should reject such admissions by a man who is not a party to the suit, is one of which we have many familiar instances in the law, which must be common to England and to Scotland. It was only the other day that the Court of Appeal in England were dealing with a case of mortgage in which the mortgagor had assigned his interest in the equity of redemption, and it was attempted to prove payments of interest on account antecedently to that assignment, by admissions of the mortgagee, made afterwards. They were held to be inadmissible, because for this purpose his interest had passed to a stranger, who could not be affected by his admissions.

No authority whatever has been cited for the admission of this evidence, and in my judgment it would be of dangerous example if it were allowed.

LORD BLACKBURN: I am of the same opinion. I do not wish to decide anything more than the exact point that is now raised before us, namely, whether this statement made by Lord Huntingtower, who died before 1874, is admissible in this case. I say nothing whatever about its weight. My conclusion is that it is not admissible; and if Lord Huntingtower had been the most immaculate and thorough gentleman, whose word every one would have believed as a matter of course, my conclusion would have been exactly the same, and I should still have said that the rule of law required that this evidence should not be received. Of course its weight when received is a different question altogether.

The first thing that I think should be considered is, what is the nature of the proceeding in which this is tendered as evidence. This is not a suit in which Lord Huntingtower is a party. This is a proceeding which Her Majesty has sent

to the House of *Lords, an inquiry as to who is en- [501] titled to the peerage; and the House of Lords has referred it to the Committee for Privileges, who are now to decide who is entitled to the peerage. The evidence which has been given establishes that Lord Huntingtower if he had lived would have been Earl of Dysart (at least I take it for granted that that is established for the purpose of the present point), and that he did openly, in the presence of every one, marry in the face of the church, in the year 1851, a lady, and was the father of one claimant to the peerage. An opposite claim is set up, the allegation being that that marriage is void because at the time of that marriage Lord Huntingtower was incapable of contracting matrimony, as he had a wife then alive; and no doubt if that was proved, it would be a very good answer to the claim. But that is not a question to which Lord Huntingtower is a party. The question whether either, and if one, which, of the two claimants is entitled to the peerage, is a question which I think probably in strictness and accuracy may be said to be a question between the Crown and this House, and the two claimants; but it certainly is not a question in which Lord Huntingtower should be considered a party to the cause. That disposes at once of a great many of the cases in which the statements of a person, whether alive or dead, who is a party, or whose representatives are parties, to the cause, are admissible in evidence. There, what he said, whether alive or dead, as against his interest, is admissible as against him, as being his admission. Nothing that Lord Huntingtower said could be admissible upon that ground, if he was not a party.

Then there is another view in which a great many admissions and statements may be admissible, and it is this. Evidence has been given (its weight has hereafter to be considered) that Lord Huntingtower and the lady, Miss Axford, went to Scotland; and there has been evidence given that what constituted a marriage by the law of Scotland, by words of contract *per verba de præsenti*, did take place there and then. Whether that evidence is reliable or not, and whether it is contradicted by other evidence or not, are not questions that we have now to discuss. It is enough to say that the evidence was given. Then I take it, that both upon common sense, and upon all the authorities, where there *has [502] been such evidence given, and you are to see whether or no it is true, you look at what the parties did; what is technically called the *res gestæ*, viz., their conduct at the time, their conduct before, their conduct afterwards, and all that they may

do and say, as tending to show that they did really enter into this contract, or as tending, on the other side, to show that they did not enter into this contract. Whether habit and repute might constitute a marriage in Scotland I do not pretend to say with accuracy; but that question does not arise here, because the parties left Scotland almost immediately afterwards, and returned to England. Habit and repute in England could not form a marriage, but it might throw great light upon what took place before. In some cases it would be weighty evidence, in others it would not. But upon that ground the statements of Lord Huntingtower, though not a party to the cause, yet being one of the alleged marrying parties, would, whether he was alive or dead (his death makes no difference upon this) be admissible whenever they were part of the *res gestæ*, and part of what would tend to show that his conduct before or after, was such as to affirm, or disaffirm, the alleged contract that was said to constitute a marriage in Scotland.

Now, upon that ground, a great many things are admissible. They are not the less admissible because he is dead, but they are not the more admissible on that ground. The course taken here has been, that when there has been any doubt as to whether matters might have been admissible under that head, they were received *de bene esse*. Many of them will no doubt be received, but some there may be a question about; it will be considered hereafter which of them are admissible and which of them are not. But this present case cannot come under that head, for this reason: that Lord Huntingtower did, in the year 1851, marry openly, in the face of everybody, a lady in England; he made there the most positive assertion that a man could make that he was an unmarried person; and whatever he may have done since that in declarations to other people as to whether he was married before, or whether he was not married before, can never be received as part of the *res gestæ*, tending to prove or disprove, affirm or disaffirm, the previous evidence of a marriage in Scotland. They cannot be received on that ground. They must rest entirely upon the ground that

503] *Lord Huntingtower said so, and that he is to be believed or that he is not to be believed, as the case may be. All that I have hitherto said applies equally both as to the law of England and the law of Scotland. When there comes a decided difference between the laws of evidence as administered in England and the laws of evidence as administered in Scotland, this being a question of a Scotch marriage, I take it that we are a Scotch court and that we ought to fol-

low the Scotch law of evidence. In England hearsay evidence, that is to say, the evidence of a man who is not produced in court and who therefore cannot be cross-examined, as a general rule is not admissible at all. To that there are several exceptions, one of which is that in cases of pedigree where you prove that a deceased member of a family had made a statement that the state of the family was so and so, for convenience' sake and from the impossibility of proving relationship otherwise, such a statement is admissible as an exception from the general rule excluding hearsay evidence. But upon that exception is grafted another,—that the statement made must have been made before the controversy arose; not that this proved that the statement was false, but that it took away the strong *prima facie* presumption that the deceased party would speak, to the best of his belief, what was true about the family. The rule, if we had been dealing with the law of England here, would not have admitted what was stated after the year 1851 by Lord Huntingtower; for, though he was a relative, and the relative of all others who perhaps knew most about it, it was clear that his statement was *post litem motam*, after the time he had married another wife; and if this statement was true, he had two wives. That would clearly not have been admissible in England, but the law of Scotland has never adopted that principle of the law of England. The law of Scotland is this, as I understand it, and I quote here from what Lord Benholme said in one of these cases (*): “You must produce the best evidence that can be got, and when a witness is alive you must call the witness.” I am putting aside admissions which are evidence *per se*, because made by a party to the action. If you show that a witness is dead, then as a general rule in Scotland, I take it, you may prove what he said as bearing upon and proving distinctly a fact. *There must always be a good deal of caution and [504 consideration about whether the evidence of a deceased man was proving a fact, or whether it was some general rambling, vague statement. It is only facts that lay within his own knowledge that could be proved in that way; but the dead man's statement of what he could have proved if called as a witness, would as a general rule be, *valeat quantum*, admissible. I take that to be the general rule. I will not inquire into the cases which have been cited to prove the exception, by which a precognition, as it is called, is held not to be admissible, because that question is not yet raised, and I think it is not desirable to decide or express an opinion

(*) *Macdonald v. Union Bank*, Court of Sess. Cas., 8d Series, vol. ii. at p. 970.

upon a question of that sort, until it is actually raised and necessary to be decided. But there is this question now distinctly raised: Can what Lord Huntingtower said after the year 1851, when, as it seems to me, he not being a party his admission would not be evidence, and the time when he said it not being such as to make it part of the *res geste* which would throw light upon the truth or untruth, the accuracy or inaccuracy, the probability or improbability, of the statement which has been sworn to—that a marriage took place in Scotland—can what he said at that time be admissible? I think it cannot, upon this ground: If I am right in saying that by the law of Scotland it is received, because the witness being dead you could no longer call him, it would follow at once that you must show that the man could have been called as a witness if alive. It is impossible to say that if a person said something, and could not himself, if alive, have been permitted to give testimony to prove it, he can, by dying, render that statement admissible. I think that is a self-evident proposition. Now at the time when Lord Huntingtower died, and of course, *à fortiori*, during the time when he lived, he could not be received by the law of Scotland as a witness in such a case as this. There had been a relaxation of the law of evidence by the acts of 15 & 16 Vict. c. 27, and 16 & 17 Vict. c. 20, by which the evidence of parties, and their agents, and persons interested, was admitted, but these statutes excepted the class of cases of which this is one, cases which related to the *status* of marriage, declarators of marriage, bastardizing of issue, and all that class of cases within which the present case falls. Now Lord Huntingtower never during his life, in such an action *as that could have been called as a witness. He died before the act of 1870 was passed, and therefore we need not inquire what would have been the effect of it if he had survived. He died when he was incompetent to give evidence as a witness, and it seems to me to follow that if he could not have given evidence when alive, it cannot possibly be competent to give secondary evidence of what he would have said if his death had not prevented him. Taking that view of the case, without deciding anything else, I think that the present evidence should be rejected.

LORD WATSON: My Lords, the question objected to was put for the avowed purpose of eliciting from the witness certain statements that were made to him in the years between 1860 and 1864, by the deceased Lord Huntingtower; and I am of opinion, with your Lordships, that that line of exam-

ination is not competent, and that the question should be disallowed.

My Lords, I do not think that the present question raises any controversy with regard to the law of hearsay evidence in Scotland. What I understand hearsay evidence to be is this: either the writing, or the verbal statement proved by a witness who heard it, of a person deceased, who, if alive would have been a competent witness in this proceeding. But seeing that Lord Huntingtower died before the year 1874, there is no pretence for saying that he ever was at any period a witness, who according to the law of Scotland, would have been competent to be examined either for or against his own marriage with the petitioner in the year 1844.

My Lords, the statements of one in his position would in the ordinary case have been provable according to the law of Scotland, notwithstanding that fact of his not being a competent witness, and those statements would have been as provable by third persons during his lifetime as after his death. But the only ground upon which these statements would have been admissible in evidence, as I understand the law, was this; that he was a party to the suit. Now what was meant by his being a party to the suit, was, that he was what we call in Scotland a party to the record, appearing either by himself, or what was the same thing, by his personal representatives, after his decease. Statements made by *him were binding, and were received as state- [506
ments against him, and those statements were received up to the period of the proof, according to the law of Scotland. The principle upon which such evidence was admitted was this. It was in his power when called as a defender in an action for constitution of marriage, to admit the marriage upon record, and the court thereupon gave decree at once. It was in his power at any time after he had stated a plea that he was not married, to withdraw from that plea and substitute a confession of marriage; and in ordinary circumstances where there was no impediment, he might do that down to the latest moment before judgment was given, because although in cases of divorce, the courts of Scotland, from fear of collusion, do not permit a defender to confess, that never was the rule in an action brought for the purpose of constituting a marriage.

But, my Lords, in this case Lord Huntingtower is not a party, and he could not have been a witness. Therefore his statement can neither be taken as secondary evidence of what as a witness he could have said, because as a witness he could have said nothing; nor can it be received

as a statement of a party to the record, because he is not in that position; and even if he were, I should have been prepared to hold that his marriage *in facie ecclesie* in the year 1851, which, according to the law of Scotland, conferred upon the issue of that marriage the *status* of legitimacy, at and from the period of their birth, was quite sufficient to make him liable to a personal exception from that date, whenever he came forward to make a statement either in his own suit or in that of others to the effect that he had been previously married.

Upon these grounds, either of which is to my mind quite sufficient, not only to justify, but to require, the rejection of such evidence, I agree with your Lordships.

Counsel were informed that this evidence could not be admitted.

Evidence was given which showed that the policeman Peter Horne died about 1860. Mr. Shiress Will tendered in evidence a document, dated the 8th of November, 1851, the body of which had been proved to be in the handwriting of the man Jarrett who brought the action against Lord Huntington in 1853, and the interlineations and signature of which were in the handwriting of Peter Horne. He stated [507] that it contained a statement of *matters which took place in 1844, of which Horne, if alive, would have been a competent witness.

Sir John Holker said he admitted that Peter Horne was dead, and that he did not dispute that the signature and interlineations were in his handwriting, but he objected to the reception of the document, being an ordinary precognition, and therefore not admissible.

Mr. *Shiress Will* submitted that it was not open to the objection which had caused the rejection of precognitions in the Scotch courts, because the interlineations showed that Horne had exercised his mind with regard to the verbal accuracy of the statement. He pointed out that Horne had altered the words "I went with Mr. T. from Edinburgh to Trinity" into "Mr. T. came to Granton County Police Station House;" that he had struck out "as his wife;" that he had inserted "*tour* or *jant*," and also "it is impossible to recollect all;" showing that he did not accept the statement as originally drawn up. This circumstance took it out of the category of precognitions.

As regards the admissibility of this document as evidence, the following opinions were delivered:

1881. Feb. 21. LORD WATSON: My Lords, I am very clearly of opinion that, according to the law of Scotland, this document thus tendered is not receivable. The circumstances under which it was signed by the late Mr. Horne appear to be these: Mr. Jarrett was intending to raise and prosecute an action against the late Lord Huntingtower, and in that action he proposed, if he could make his contention good, to show that the present petitioner had been lawfully married in Scotland to Lord Huntingtower. I do not doubt that the document, so far as we are able to trace its history, is simply a precognition, in other words, written information obtained from a person proposed to be made a witness in that cause. Now I take it to be quite settled in the law of Scotland, settled in practice, and confirmed by the case of *Macdonald v. Union Bank* (*) in the year 1864, that a document so originating is not competent evidence [508 in any subsequent cause. The general rule of the law of Scotland is that hearsay of a deceased person who would have been a competent witness, is receivable, and the writing of a deceased witness is hearsay, and in some cases may be hearsay of the very best order. But that rule of the law of Scotland is subject to exceptions, and I entirely concur in the view expressed by the present Lord President of the Court of Session in the case of *Macdonald v. Union Bank* (*) that those exceptions ought to be favorably received, and that the rule ought not to be widened beyond its present scope. The document tendered appears to me clearly to fall within the exceptions, and therefore must, in my opinion, be rejected by the committee.

LORD SELBORNE, L.C.: I am of the same opinion.

LORD BLACKBURN: I am of the same opinion.

As to a document purporting to be signed by Margaret Ritchie, otherwise Bremner, dated the 15th of November, 1851, the body of which had been proved to be in the handwriting of Jarrett, Mr. Shiress Will admitted that the questions in the document appeared to be of a leading character. But he submitted that it might be distinguished from that which the committee had just rejected by the fact that the answers were entirely in the handwriting of Margaret Ritchie or Bremner, showing that she had an opportunity of giving a complete answer to the questions put to her; and also there was appended a declaration that the answers were all true. The answers here were holograph of Margaret Bremner, and therefore admissible as the best procurable evidence

(*) Court of Sess. Cas., 3d Series, vol. ii, p. 993.

(*) Court of Sess. Cas., 3d Series, vol. ii, p. 963.

of what was within her knowledge. Dickson on Evidence (2d ed.), p. 90, mentioning the case of *Macalister v. Macalister* ('), says, "It would seem the letter or note holograph of a deceased person may be used."

[LORD WATSON: Mr. Dickson is not referring there to a holograph letter even sent to an agent; and with reference to the case of *Macalister*, the document in question there appears to have been some answers given by a lawyer in regard to the law of Penang; but there was no judgment given upon the point.]

509] *See also *Magistrates of Aberdeen v. Moore* (')—voluntary affidavit of a person since deceased refused to be admitted.

The following opinions were delivered :

LORD WATSON: My Lords, I do not think it possible to distinguish between the document which is now tendered and that upon which the Committee have recently ruled. A precognition, I take it, represents the substance of questions or suggestions made by a party or his agent to a particular witness, and the replies given to those questions or suggestions by the witness, and it is simply because it does represent a result so procured that the law rejects it. Now this document seems to me to put in the form of question and answer that which is really covered by the ordinary form of precognition. You have the result stated in the one case; you have the process by which the result is obtained set forth in the other; and as it is because the process itself is objectionable that the law rejects the result, I think that when the result appears in the form of question and answer, that objection is not removed, but exists in even a stronger form.

LORD SELBORNE, L.C.: I quite agree.

LORD BLACKBURN: I am of the same opinion.

Feb. 21, 22. *Sir John Holker* having no witnesses to call, *Mr. Shiress Will* was heard to sum up the case of Elizabeth, styling herself Dowager Lady Huntingtower.

[He cited *Pennycook v. Grinton*—promise of marriage followed by conjugal intercourse makes a lawful marriage *de præsenti* ('); *Sim v. Miles* ('); and *Mackenzie v. Mackenzie*—marriage having been constituted by habit and repute, no regard will be paid to subsequent writings acknowledging that the parties did not live together as man

(¹) Court of Sess. Cas., 1st Series, vol. xii, p. 198.

(²) Mor. Dic., 12677.

(³) 17 June, 1818. Hume's Dec., p. 502. viii, p. 89.

(⁴) Court of Sess. Cas., 1st Series, vol.

and wife (¹); *Dalrymple v. Dalrymple* (²).] See also Ers-
kine's Prin., 14th ed., pp. 58, 59, and cases there cited.

**Sir John Holker* was heard to sum up on behalf [510
of William John Manners, Earl of Dysart.

The Lord Advocate, on the part of the Crown, submitted
that Elizabeth, styling herself Dowager Lady Huntingtower,
had not established her case.

The following opinions were delivered :

LORD BLACKBURN: My Lords, the evidence given before
your Lordships establishes that the late Lord Huntingtower,
the eldest son and heir apparent of the last Earl of Dysart,
on the 26th of September, 1851, openly married, in the par-
ish church, Miss Burke. They lived together openly as
husband and wife till 1860, a date which it may be material
to remember. The petitioner, William John Manners, is
proved to be the eldest son of Lord Huntingtower by that
marriage, and is clearly now the Earl of Dysart if that mar-
riage was valid. It was formal and regular in every respect,
and is valid, unless Lord Huntingtower was incapable of
marrying on the ground that he already had a wife then liv-
ing. The burthen of proof is on those who in any proceed-
ing assert a marriage: when the proceeding is delayed till
after there has been a second marriage that *onus* is greatly
increased. The man who having a living wife, goes through
the form of marriage with another woman in England,
whether the first marriage was regular or irregular, if it was
valid, commits the crime of bigamy, and is liable on convic-
tion to seven years' penal servitude. Those who allege that
a man has committed a crime have the *onus* of proof cast
upon them, for the presumption of law is always in favor of
innocence. I think, however, that Lord Huntingtower's
general conduct was such as to reduce that presumption in
his case to a minimum. But the effect of establishing a prior
marriage would also be to reduce the lady, who had *bona
fide* contracted the second marriage, from the position of a
legal wife to that of an injured woman, who has innocently
committed adultery, and to reduce the children, if any, of
the second marriage from the *status* of legitimate children
to that of bastards. Painful as those results would be, they
form no reason why the tribunal that has to decide the ques-
tion should shrink from doing their duty and finding the
fact *according to the truth, if the evidence is such [511
as to lead them to the conclusion that a valid first marriage
existed: but they do, in my opinion, afford very good rea-
son for increasing the *onus* of proof which lies on those who

(¹) Mar. 8, 1810, Fac. Coll., vol. xv, p. 613.

(²) 2 Hagg. C. R., at p. 95.

allege the first marriage, and afford very good reason for refusing to find the first marriage, though there is evidence which, if believed, would establish it, unless that evidence is in the opinion of the tribunal of such weight as to satisfy that *onus*. This observation goes rather to the weight of the testimony required as a matter of common sense, than to the law as to what is admissible.

Passing from these general observations to this particular case, it is, I think, proved that, in 1843, near Bath, Lord Huntingtower seduced, she says ravished, Elizabeth Acford, who claims, on the petition now before your Lordships, to be Lady Huntingtower, and, by him, to be mother of Albert Edwin Tollemache, born in 1863, on whose behalf she claims the earldom. She consented, however, after this, to go with him to London and elsewhere, and live with him under the names of Mr. and Mrs. Tollemache, which they seem frequently to have spelt as it is sounded, Talmash, and this continued till 1848. She bore to him three daughters, and then he, in 1848, turned her off and left her in destitution, so that she had to apply for parochial relief for herself and her three daughters. My Lords, even if it were shown that she had misconducted herself, this would have been mean and ungentlemanly conduct on his part to her. As regards his three innocent daughters, it was utterly without excuse. But this is not the question now raised, which is whether there was a marriage. During the whole of this first period of cohabitation, both parties were of full age, required no assent to their marriage, and there was no legal impediment to or practical difficulty in their being married in England if they pleased. But such a marriage, if it took place in England, would be registered, and not only is there no register, but it is not alleged that any form of marriage ever took place in England. At that time and down to 1856, when 19 & 20 Vict., c. 96, was passed, an irregular marriage contracted in Scotland was valid, though by parties who had neither of them lived in Scotland before. And there is evidence before your Lordships that Lord Huntingtower and Elizabeth Acford, in June or July, 1844, some months after she had gone to live with him in London, and they, in 512] *London, had borne the names of Mr. and Mrs. Tollemache, were in Scotland, bearing there also the names of Mr. and Mrs. Tollemache, and there cohabiting. They stayed in Scotland about three or four weeks, and then returned to England, and never were in Scotland again. During that time there was no impediment to their contracting an irregular marriage in Scotland, which, if so contracted

as to be valid in Scotland, would be valid everywhere. The allegation of the petitioner, Elizabeth Acford, is that there then was such an irregular marriage. The question of law is, whether there is evidence sufficient, if believed, to establish such an irregular marriage; and then, if that is answered in favor of the petitioner, arises the question of fact. Is that evidence such, and of such weight as, though the *onus* of proof is on those alleging the first marriage, to induce your Lordships, as judges of fact, to find that that irregular marriage did take place.

Before proceeding to express my opinion on those two questions, I think it well to say a word or two on the law of Scotland as to irregular marriages.

A promise made in Scotland to marry, *subsequente copula* in Scotland, constitutes an irregular marriage, but that promise, though it need not be in writing, must be proved by writing in Scotland; or, perhaps, if the court in its discretion thinks fit to allow it, by reference to oath. Lord Huntingtower is dead, and, if alive, a reference to his oath would hardly have been granted. See *Longworth v. Yelverton* (¹). That sort of irregular marriage may, in this case, be thrown out of consideration altogether, for neither now nor at any time has it been alleged that there was such a marriage.

Habit and repute in Scotland also forms an irregular marriage. There has been an erroneous popular notion that if a man and woman cohabiting together in Scotland call themselves husband and wife it constitutes habit and repute. There is a letter of the 5th of February, 1849, by the petitioner to the late Lady Dysart, on which I shall have hereafter to make remarks when I come to deal with the question of fact. In that letter she expresses that popular notion thus, "He has acknowledged me as his wife by living together as such in Scotland."

My Lords, the question as to what is habit and repute in Scotland *has recently been much discussed in several [513 cases in this House. I think that the period over which what is alleged to be habit and repute extends must always be very important. I believe that there never has been a marriage by habit and repute established in any case where the period over which the habit and repute extended has been so short a period as three or four weeks. And, though I am not prepared to lay down as law that even a shorter time might not be, under peculiar circumstances, sufficient, I am not prepared to decide that it would. But I think

(¹) Law Rep., 1 H. L., Sc., 218.

that habit and repute is not constituted by the parties speaking casually of each other as husband and wife to persons to whom the introduction of the woman as his wife could neither be important nor significant. And if every word of the evidence here is accepted as absolutely true, it comes to no more than that Lord Huntingtower in Scotland, when taking lodgings or rooms at an inn for the woman with whom he cohabited, did not say that she was his concubine, so as to cause those who kept the lodgings or inn, if respectable, to refuse to take them in, but gave their names as Mr. and Mrs. Tollemache, which no doubt amounted to a representation that they were married, but did not amount to habit and repute. If she had been introduced as his wife to any persons in the society in which Lord Huntingtower then moved, especially if she had been so introduced to ladies, there would have been something to consider. It is, in the view of the case which I take, material, when deciding the question of fact, to remember that such a case might be made, and I think was put forward, by the petitioner in her letter of the 5th of February, 1849, and probably on her behalf in Jarrett's action in 1853, though it is not now proved; and indeed is not relied on now.

But there is a further way of constituting an irregular marriage in Scotland. A contract between a man and woman, capable of entering into a contract, to be forthwith and thenceforward husband and wife, if serious, deliberate, and mutual, constitutes very matrimony, if there be no impediment. There are no technical rules as to the proof of such a contract. It may be proved as any other contract.

All these points were carefully considered and decided by this House in the case of *McAdam v. Walker* (') in 1813. 514] The facts *there were that Mr. McAdam, owner of a large entailed estate, lived with Miss Walker as his mistress, and had by her children. On the morning of the 22d of March, 1805, between 10 and 11 o'clock, he sent for three of his servants, and on their coming in said he had called them in to be witnesses of his marriage; he asked Miss Walker to rise, which she did. He took her hand, and said, "I take you three to witness that this is my lawful wife, and the children, by her are my lawful children." Miss Walker did not speak, but curtsied in token of assent. There was no writing whatever. That afternoon, a few hours after this marriage, and before there could have been any subsequent intercourse, or time for habit and repute, Mr. McAdam shot himself. It was in that case that the Lord President (Sir

(') 1 Dow., 148.

Islay Campbell) said that he did not conceive that McAdam was of sufficient sound mind to contract at the time of marriage; and that at any rate he conceived the object of Mr. McAdam to have been not to make Miss Walker his wife, but his widow. How, said Lord Eldon, it was possible for him to make her his widow without making her his wife could not very easily be conceived.

Lord Eldon and Lord Redesdale gave very careful and elaborate opinions; and Lord Eldon proposed (1), "that the present judgment should be prefaced by some finding which might distinguish it from the loose cases noticed by the bar. The finding might be of this nature:

"1st. That at the time of the declaration of marriage in question Mr. McAdam was of sound mind and able to contract.

"2d. That being thus of sound mind it was unnecessary to decide upon the question of previous insanity, or any circumstances connected with it.

"3d. That by the declaration of marriage, and the facts and circumstances connected with this declaration, it appeared that the parties did, on the 22d of March, 1805, intend forthwith to marry, and did accordingly contract very matrimony."

I may observe that there can be no contract of any kind between any parties unless there be mutual consent, but that if one of the parties use words intended to induce the other party to contract on the faith that he himself means to consent, and does thereby induce the other to contract accordingly, he is precluded *from denying that he [515 did so consent, and the contract is binding. The evidence here, if it proves anything, proves that Lord Huntingtower was consenting, but if the question rose as to the effect of a pretended consent to marry so given as to preclude him in an ordinary case of contract, I should be very unwilling to dissent from what is so well expressed by Lord Stowell in *Dalrymple v. Dalrymple* (*).

This being a question as to a Scotch peerage, your Lordships act upon the Scotch rules of evidence and not upon the English, where the laws of the two countries are not the same. They do differ on the questions as to when the rule against hearsay is to be relaxed where the hearsay evidence is that of a deceased person, and so far as any points arise on that difference, your Lordships have already decided. I do not think that the petitioner, Elizabeth Acford, who is asserting that she was the wife of Lord Huntingtower, would,

(1) 1 Dow., at p. 186.

(*) 2 Hagg. C. R., at p. 107; see *post*, p. 543.

according to the law of Scotland, before the 37 & 38 Vict. c. 64, have been an admissible witness in a proceeding which, though not strictly a declarator of marriage, is very much of that nature, but since that act I think she is an admissible witness, though one with a very strong bias, and whose evidence, therefore, must be received with proper caution. Whether in any case according to the law of Scotland the evidence of one witness would be sufficient, or whether in an English court, where one witness is enough, it would be safe to act upon the evidence of a woman in such a position, when there was nothing either to contradict or confirm it, may be decided when the question arises. But though hers is the only direct evidence as to the fact of there being a contract to marry by *verba de presenti* in Scotland, there is evidence in the present case proper to be considered as confirming, and also evidence proper to be considered as contradicting, her statements on that point. I take it that both by the law of Scotland and England evidence may be given of what is commonly called the *res gestæ*. It is not very easy sometimes to draw the line between what are *res gestæ* and what not; but when admissible as such, it does not matter whether the *res gestæ* took place in England or in Scotland. To put a case which has never happened, but which might happen,—suppose the question were whether there was a valid 516] Gretna Green marriage, the only direct *evidence as to the contract at Gretna Green being that of the woman, who swore that she was there married *per verba de presenti*. It could hardly, I think, be disputed that evidence that the alleged husband ordered post-horses at Carlisle to take him and the woman to Gretna Green would be admissible as part of the *res gestæ*, and though happening in England and before the alleged ceremony, would, if proved by independent testimony, go far to corroborate her statement that she was then and there married. If only proved by her own testimony, of course it could add no weight to it. And so, if it were proved that immediately after the alleged ceremony the couple went to England, and there were by habit and repute treated as married people, though that taking place in England could not, possibly, constitute a marriage, it would surely confirm her testimony as to the alleged contract in Scotland; and so, if it were shown that in England, immediately after the alleged marriage, she was reputed to be, and submitted to be reputed to be, a concubine, and not a wife, it would go far to shake her testimony as to the marriage. When things said amount to being part of the *res gestæ*, proof of them is admissible, whether the speaker is

alive or dead, and whether he is called as a witness or not; but many things done or said by a witness are admissible on the other side to shake the credit of that witness, which would not be admissible if that witness were not called. I think the letter of the 5th of February, 1849, to which I attach much importance, falls within this class of evidence.

My Lords, it is of great importance that the administration of justice, especially where there is much difference between the parties in wealth and state, should not only be fair and impartial, but also that it should be beyond suspicion. This caused your Lordships to give the petitioner more time and more opportunity to bring forward her case than she was at all entitled to claim. And this induces me to state the reasons for the opinion on the evidence to which I have come fully, and I fear it may be felt tediously, in detail.

I will now proceed to state what I understand to be the material part of the evidence given at your Lordships' bar; and what is the effect which it has on my mind, and, in my opinion, ought to have upon your Lordships' minds, in deciding the question of fact.

Elizabeth Acford, after stating that she was seduced, or, as she *asserts, ravished by Lord Huntingtower in [517 the end of 1843, says that he, by repeated promises to marry her, induced her to agree to go to London to live with him. She asserts that such promises were also contained in letters which she cannot produce, because they were taken from her and have been destroyed by Lord Huntingtower. And it does appear that some letters were so taken from her, and are not produced by his representatives. Whether the letters she specifies were amongst those, and whether their contents are accurately given by her, are matters depending entirely on her credit. A profligate man would readily make such promises by word of mouth to a woman and they could never, as the law then stood, be proved against him. A prudent man would not have made such promises in writing, as these letters would enable her to maintain her action for breach of promise of marriage. As Lord Huntingtower was profligate and not prudent there is no improbability in this part of her story. She lived with him in London and elsewhere, but represents that she had no further intercourse with him till she was, as she says, married to him in Scotland. But as in cross-examination she admits that she had lived in several successive lodgings provided by him under the name of Mrs. Tollemache, he visiting her under the name of Mr. Tollemache, that he often passed the night

there, sometimes sleeping in a bed in her dressing-room, sometimes in a chair in her bedroom, and finally, when pressed, refusing to swear that he did not sometimes sleep on the same bed that she occupied, pp. 142, 143, I think that may be disregarded, and this motive for marrying her at all, did not exist. She asserts that he was all this time constantly promising to marry her, but did not do so because she was in bad health, which would be no impediment to performing the ceremony of marriage, and because they could not be married before the registrar till they had resided in one place for three weeks, but they lived together for six months.

Then comes a matter, which, if proved by independent testimony, would, as I have previously explained, be, in my opinion, important confirmation of her assertion that she was married in Scotland. I will read the passage from the shorthand writers' notes.

While you were at Trevor Square, did Mr. Kenrick visit you?—Yes; he used to dine there occasionally.

518] *With Lord Huntingtower?—Yes, and Mrs. Kenrick.

While you resided at Trevor Square, did any conversation take place between you and Lord Huntingtower with reference to a marriage?—Yes, after the dinner was removed Huntingtower requested Mr. Kenrick to be all attention, as he had me up from my parents expressly to make me his wife, and he meant to take me to Scotland and marry me there according to the laws of Scotland, because he had asked Lady Dysart's consent, and she had refused; she would not give her consent to it. He said he was determined to make me his wife, whether she would consent or not, and that he was determined to take me to Scotland and marry me by the Scotch laws.

Was Mrs. Kenrick present on this occasion?—I think so, I cannot be sure. I imagine she was there. I think she dined there that day, and Kenrick advised Lord Huntingtower to seek professional advice, as he did not know the real mode of the Scotch marriages, or something to that effect.

Was that the only conversation, or were there other conversations?—A great many.

Whilst you were at Trevor Square?—Whilst I was at Trevor Square; and I said that I should return to my family again. I was very wretched and very miserable.

Did you say why?—Well, yes; because he did not seem to carry it out so quick as I considered he ought to have done, and one obstacle was put and then another, money matters, I believe, not in his feelings towards me, for he was very much attached to me.

You said just now, "Because he did not carry it out so quick;" what did you mean by that?—Because he did not carry out the marriage so quickly as I thought he ought to have done, and I told him, I threatened him, I would go home to my family again, and I would never see him any more, and the world must know of his conduct about me. I did not hold it out as a threat to him; I held it out as I considered I was justified in doing so. And he said, "Dearest, it shall be carried out if I live, and before another month;" and then after seeing his family, I think his mother, Lady Dysart, gave him some money, and he went to Scotland, and he told his mother he was going to take me there to make me his wife.

(Mr. *Shires Will.*) Did Lord Huntingtower tell you the reason why he went to Scotland?—Yes, he told me that he should go to Scotland, and he should

take a house in order for us to live down there, and he explained the marriage laws to me; he explained them to me in this way; he said if he went to Scotland and made a vow before witnesses that we intended to become man and wife, that would be a legal marriage.

That he told you before going?—Yes, before going; and he said, “Lizzie, you had better accept of it in that way.” I said, “It is not a proper one; it is a reckless one.” He said it was not so if it was carried out in a true spirit; and I consented to go, with a good deal of persuasion. At least, he went first, and he took the house Grecian Cottage, Trinity, Edinburgh, and in the meantime Mr. and Mrs. Kenrick—

He went first?—Yes, and he was away a week.

And then he returned?—Then he returned.

What did he say to you when he returned?—I was boarding at the Kenricks then, and he said that he had taken the house down there, Grecian Cottage, in order to make me his wife, and that I was to come to Scotland; and I objected to it, and Mrs. Kenrick said, “Well, do not be foolish.” She said, [519 “You go. Let him do it in his own way.” I said, “I will not go with him;” and he said, “Very well, then I will soon determine upon that point. You need not go—you can follow me;” which I did do.

Then he went down to Scotland again?—Yes.

Then did you hear from him?—I heard from him, and the Kenricks heard from him.

What has become of the letters?—They were along with all the rest.

What did he say in the letter to you?—He spoke very affectionately to me, and begged of me to keep up my spirits and everything should go right and proper; that he meant honorably to me from the first moment; that he could not live without me, and that none of his family should ever stand as a bar between him and me in becoming man and wife.

Then did you go down to Scotland?—I went down in a steamship called the Clarence. Mr. and Mrs. Kenrick came to Blackwall, and we dined there; and then they saw me on board, and handed me over to the captain. We left there on Saturday night between 9 and 10 o'clock, and we ought to have arrived on the Tuesday night, whereas by a severe storm we did not get in till the Thursday evening, and Huntingtower was very unhappy and miserable indeed; he thought we were all drowned.

There is no misapprehension as to what she means to assert as to Mrs. Kenrick's knowledge of all this, for when on cross-examination she is asked—

“Why did you not go with Lord Huntingtower to Scotland?”—Her answer is, “I followed him. I did not go with him. He wished me to go, but I would not. Mrs. Kenrick blamed me for it. I said, I do not care, I will not go with him. I stopped at her house.” And afterwards, when she is cross-examined as to a dinner which she said was given at Greenwich on her return to celebrate the wedding, and asked if there were any ladies there present, and says, “Three, one of whom was Mrs. Kenrick,” she is asked, “Mrs. Kenrick knew perfectly that before you went to Scotland you were not married?” and answers, “She was perfectly aware of it, and she arranged matters with Lord Huntingtower, my stopping there, and their seeing me off at Blackwall, and we dined together there. They were Lord Huntingtower's friends, not mine.”

Mr. Kenrick is dead. He was still alive in 1853, when Jarrett brought his action, as to which I shall have more to say. Mrs. Kenrick, now Mrs. Steggall, is alive. Your Lordships adjourned the proceedings for a fortnight that she might be, if possible, produced as a witness. She was produced, and instead of confirming Elizabeth Acford's testi-

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mony contradicted it. She says that when first she saw Elizabeth Acford, Lord Huntingtower introduced her as his wife, and said that they had been married three days before in the country (which, if he said it, was a falsehood, but it is by no means incredible that he did then tell a lie), and 520] that she *always believed them to be legally married, and never heard of their being in Scotland at all. She adds what, if she is giving evidence *bona fide*, shows both that her memory has greatly failed her, she being now an aged woman, and also that the intimacy between her and Lord Huntingtower and Elizabeth Acford has been greatly exaggerated. For she says that she continued to see them, and they continued to live together, till she and Mr. Kenrick went to New Zealand in 1852, from which they returned in 1853. Now we know both from Elizabeth Acford's testimony, and from written documents, that in 1848 Elizabeth Acford was discarded by Lord Huntingtower, he alleging, truly or falsely, that she had a clandestine correspondence with Mr. Kenrick, and that, in 1849 and 1850, she was in receipt of parish relief, and in 1851 Lord Huntingtower was married to Miss Burke and living with her. I see no reason to doubt that this witness is speaking what she now believes, and though her memory has much failed her, I think that as long as she remembered anything at all about the matter she could hardly forget what Elizabeth Acford says if it was true. I may add that in 1853, when Jarrett's action was tried, Mrs. Kenrick was a younger woman, and must have had a much fresher recollection of everything. I think, therefore, that there is here a conflict of testimony as to a material part of Elizabeth Acford's evidence.

I resume reading the notes of her evidence where I left off in 1844 :

Did anybody then meet you?—Yes, Frederick Spicer, his man-servant, with a carriage and a pair of horses ; and he saw to my luggage, and they drove me, he and another man, to this Trinity Cottage, within three miles of Edinburgh ; and there Lord Huntingtower received me on the lawn ; he was very kind and very affectionate.

Will you state to their Lordships all that passed ; you say that Lord Huntingtower received you upon the lawn?—Yes, he received me upon the lawn, and the first thing he did he shook hands with me ; he was thankful, he said, I had arrived after the storm, and he presented me with a white rose ; and then he gave me his arm, and I went in the house, and then he called his man-servant, and he said, "Fred" (or Frederick, or something) "you must be our clergyman. I have brought Miss Acford here expressly to make her my wife, and whether I live or die, always stand up for her." He said, "My family would do anything rather than that I should marry this lady, but my object is to bring her out as my wife, which she deserves ;" and he placed his hand on my shoulder, and he said, "I now make you my wife in the presence of Frederick Spicer,"

*Did Spicer say anything?—Spicer said, "I will, my Lord." [521]

Did you say anything?—I said, "Yes," I took him for my husband.

Do you remember what you said?—No, I cannot exactly remember at the moment. I said "Yes," I think.

Will you tell us in your own way what else happened?—Then in the course of the evening (it was daylight then up to 8 or 9 o'clock) he gave me a ring, which I have now got on my hand. Do you wish me to produce it?—Yes, certainly.

It was a wedding ring, and he put it on my finger, and he said, "Dearest you are now my wife." That is the ring (*producing a ring*). I cannot wear it on my wedding finger. Would my Lords like to look at it?

Is it an ordinary wedding ring?—It is an ordinary wedding ring. It is ten years ago that I left off wearing it simply because my finger swelled. It got too small for me. I can now wear it on my little finger.

That you say is the ring which Lord Huntingtower gave you?—That is the ring which Lord Huntingtower gave me.

On the evening of the first day you arrived?—On the evening of the first day I arrived.

Did anything else pass on that day that you wish to tell us; any other conversation, or anything of the kind?—I said, "Is that all the ceremony?" and he said, "Yes, it is quite enough." He said, "Fred has been our clergyman, and he will answer for it," or something to that effect. With that I told him I was scarcely contented, but he said, "Not so, it is legal, and my father being a Scotch peer will make the marriage more binding. It is a true marriage." He said, "And I can never marry any other women hereafter."

What did you do or say to that?—I said, "I was content," "I was satisfied," and I considered myself from that hour to be the wife of Lord Huntingtower always, honorably so; and I am sure I never had any doubt upon it. I felt that it was right and proper, because he had told me so, and then I made inquiries privately, unknown to him, and I was told also that it was a legal marriage.

Have you told us all?—No, there was no female servant that day, and in the morning she arrived, a woman called Margaret Ritchie, I believe, and she came, and then he called in Frederick Spicer and Margaret Ritchie, and then repeated the same words, and said, "I have brought Miss Acford (or at least she is now Lady Huntingtower) here to Scotland to make her my wife, and I call you two as witnesses to the marriage." He said, "My mother, Lady Dysart, has written a letter to me calling me a fool, and a gull, for taking my wife" (as he called me then) "to Scotland; but I defy the whole of them." He read part of Lady Dysart's letter to the two servants, and she said in the letter, "For ever afterwards, Lionel, you must call that woman your wife; you can never marry again." She was indignant, of course, but of course there it was. He said, "Now, Frederick, if anything happens to me, always stand up that this lady is my legal wife;" and he said "I will, my Lord."

Was that all that passed in the presence of Spicer and Margaret Ritchie?—There might have been more said, but I think that is about all.

How long did you and Lord Huntingtower remain at Grecian Cottage?—It was some weeks; it was over three weeks, I believe; it might be four, and it might be more than that, but I do not think it was. From that evening we lived together as man and wife; we cohabited together as man and wife from the hour he made me his wife by saying those words in the presence of [522 his servants.

Up to that time had you any intercourse with him after what passed at South-stoke?—Certainly not. My health was not sufficiently adequate to anything of the kind; and not only that, but my mind and feelings were quite in disgust about it, or having it alluded to.

I have already expressed my opinion that the way in which the two treated each other after this alleged contract

of marriage, in England is admissible as part of the *res gestæ*, and may be of weight as confirming or as shaking the credibility of the evidence of Elizabeth Acford, which is the only evidence directly proving the contract in Scotland, which, according to the law of Scotland, made very matrimony.

Their first daughter was registered as a legitimate child. This was done by her, she says, at his request. The second daughter was registered, and the registry signed by Lord Huntingtower himself, on the 2d of January, 1847. It describes the child as the legitimate child of William Lionel Talmash, and the mother as being Elizabeth Talmash, formerly Acford. This is, I think, the only real confirmation of her story. And it is strong confirmation, for (though nothing done in England could make matrimony) such an act as this, registering the child as legitimate, though by what was practically a fictitious name, tends to show that he was then acting as if she was his wife, and so confirms her statement that enough had taken place in Scotland to constitute matrimony. This must be given its due weight in her favor. The other supposed confirmations came to nothing. General Harrison is called and gives evidence to the effect that he became acquainted with Lord Huntingtower, then living in a very disreputable way under the name of Mr. Tollemache, with Elizabeth Acford under the name of Mrs. Tollemache; and that in 1847 he had a conversation with Lord Huntingtower which, if accurately remembered after the lapse of more than thirty years, shows that Lord Huntingtower then told a story as to which I shall only say that it is quite at variance with what she says. And that, profligate as it was for him to speak so of any woman, it is to me quite incredible that even Lord Huntingtower should speak thus of a woman whom he was then treating as his lawful wife.

From 1844, when they returned from Scotland, till 1848, 523] Lord *Huntingtower and Elizabeth Acford continued to live together. She does not pretend that she ever saw or spoke to one of Lord Huntingtower's relatives. In 1848 she was staying at a Miss Pottle's. It appears that the lodgings had originally been taken by Lord Huntingtower, it does not quite appear when, under the names of Mr. and Mrs. Langford. Elizabeth Acford had, she tells us, become convinced, probably quite correctly, that Lord Huntingtower was cohabiting with another woman. He had asserted, she says falsely, that she had improper communication with Mr. Kenrick. There were scenes between them, and he, she says, took from her by force various letters, and then this

occurred. I will read her own words as appearing in the shorthand writer's notes at page 79.

What did he do with those letters after he had broken open the box?—He took them away. I do not know what he did with them. He said, "Miss Pottle, I wish to speak to you," and she said, "Walk in here." So he did, and he said, "This lady is not my wife." Miss Pottle said, "What right then had you to bring this lady here?" He said, "Well, my family say she is not my wife." She said, "That has nothing to do with me what your family says. You brought her here and introduced her as your wife, and I believe it; you have sworn it to me." He said, "I am not going to pay for her board and lodging here. Turn her out." I said, "You cruel brute." "No," says Miss Pottle, "she shall not be turned out. I will do what is right by this unfortunate lady, and you shall pay for it," and so she did. She kept me and my children and servants, and she brought an action in the Bromley County Court, and she recovered the money for our board and lodging.

Do you know of your own knowledge that Miss Pottle brought an action against Lord Huntingtower?—Yes, she subpoenaed me in the case; so I attended. Against whom did she bring the action?—Lord Huntingtower.

In the Bromley County Court?—Yes.

Were you present in the county court on any of those occasions?—Yes, and I was examined by the judge.

Were you a witness?—I do not know; they subpoenaed me.

Did you give evidence?—They asked me several questions, and Lord Huntingtower had got a number of professionals there, and he every now then looked up in my face, and was going to say something to me, and then ceased. The judge said, "It is evident that you have made yourself liable to support this lady as your wife, and it is your duty to pay the bills," and it was ordered so, and they recovered the money at different times, and I understood that he got the money from Lady Dysart, because his valet happened—

This, you say, was at the Bromley County Court?—Yes, in Kent.

Can you remember when it was?—It was in some part of the winter. I know it was very cold. I was then nursing my third dear baby, a young baby. She must have been about five months old. I nursed her till she was eight months old.

Do you mean in the winter of 1848?—The year that my last child was born.

It was a short time after we travelled up, you know.

*(*Lord Watson*): How many times was Lord Huntingtower sued in [524 the county court?—Three times, I think, by the same lady. The judge told her she could recover her money at all times.

My Lords, at that time, and until the 11th of July, 1853, when the 17 & 18 Vict., c. 99, came into operation, a wife was not, in England, an admissible witness against her husband, so that, appearing as a witness against Lord Huntingtower was an assertion that she was not his wife, and, so far, is a contradiction to her main story. I do not, however, attach any weight to this, as she, probably, was not aware of the law of evidence. If the judge's decision was that, wife or no wife, Lord Huntingtower had made himself liable to Miss Pottle till the contract with her already made had expired, it was perfectly right; if he said that he would be liable to her on any fresh contract entered into afterwards, I think he was wrong, but I do not think he can have so said. At all events, Miss Pottle did not continue to keep

her, and she fell into great distress, and applied to Lady Dysart. Two letters, dated in December, 1848, and January, 1849, are produced, signed E. Acford; for some reason, I do not inquire what, the correspondence was afterwards carried on by her as E. Ackland.

I have already expressed my opinion that, though nothing done or said by her could either make a marriage, if there was not one, nor undo the effect of the marriage, if there was one, yet, when she is called as a witness, it is competent for the other side to give evidence of any statements made by her for the purpose of destroying her credit; the weight of such evidence, of course, varying according to circumstances. It will be in your Lordships' recollection that she says now that Lord Huntingtower, in 1844, explained to her what was the law of Scotland, with an accuracy not to have been expected from him, and that she has remembered it ever since, with a tenacity of memory rather surprising, and must, of course, have remembered it much better in 1849. I may add also that it appears that in 1865 she received a pamphlet published soon after the Yelverton Case, which did contain a statement of the law of Scotland such as she now says she knew from 1844; and it is a part of her evidence now that not only had she believed Lord Huntingtower's statement that he had told Lady Dysart all about his marriage, but that she had read a letter from Lady 525] *Dysart to him to that effect. I will now read her letter of February, 1849, correcting the bad spelling:

Princes Square,

5th February, 1849.

Madam,—With thankfulness and gratitude to you do I acknowledge the receipt of your kind letter, with five pounds inclosed.

I will attend to all your wishes in every respect, and shall be glad to inform you the moment matters are finally arranged on the part of Lord H. if he will do anything for me. I have no doubt, Madam, with your kind interference, his Lordship's feelings may alter toward me and his poor children. I am still willing to give up the letters, as I do not wish to hold any papers of His Lordship's, that I may the sooner forget that I ever knew such an unhappy man; but in the faces of his children do I see the very image of himself, which calls to mind all my wretchedness. You say, Madam, in your letter that you should like to know what His Lordship's letters contain that is of importance to me. They all tell that he has acknowledged me as his wife by living together as such in Scotland. From that time, in the year 1844, he gave me his name, and introduces me as his wife to every one. He himself has had all three of the children registered in the name of Tollemache, and I always considered myself a married woman from that time, and he has often said if I did not feel quite safe he would take me to an English church and make me his wife openly, as he could not be happy without me, but that he should be discarded by his family, but that he did not mind; but out of feelings to his noble family and birth, I did not wish him to do so, as I have often told him if he had married a lady in his own sphere it would have been a comfort to himself and friends, but this I could not persuade him both before and since the fatal occurrence that took place between

us. If I had studied my own interest and future respectability more than I did in that case, I should now have been a happy woman. I could not bear the thought of one so noble as himself to share the fate with one so humble, if his family should discard him; but he said in one of his letters, "Let us rather beg our bread together than ever part, for we were intended for each other, and no one shall put us asunder." The task, Madam, is too painful for me to dwell on, otherwise I should like for you to know more, and I should like to send you a copy of all His Lordship's letters. I then think you, as a mother, could pity me, and see how cruelly I have been dealt with by His Lordship; but I do not wish to hurt your feelings or injure Lord H. in your kind estimation towards him, for he is to be pitied by every one. I sincerely trust he will see his folly some day, and he may yet be a comfort to you and all his family. He has my kind wishes. Madam, with regard to your name being brought up in the Bromley Court, the question was not asked of me if you gave me any money. It was, "If I had received any from Miss Toone while I was at Mr. Pottle's?" I said, "No, I had not." I was then asked, "If Mr. Toone gave me anything when I saw him?" I said, "One sovereign." Madam, your name was not spoken of to me in court.

I am sorry to inform you, Madam, all three of my children are very ill, and I have not any one to do the slightest thing for me. I am quite worn out for want of rest, and no one to speak to. My life is a burden to me.

I am, Madam,

Your very obedient,

E. ACKLAND.

*Every man must judge for himself whether this [526 is such a letter as would be written if her present evidence were true. To me it seems a very important contradiction, tending to show that her whole tale as to the contract *per verba de presenti* is an afterthought.

Lady Dysart, after supporting her for some time, withdrew her further assistance, and Elizabeth Acford was obliged to apply for parochial relief; in 1851, as already mentioned, Lord Huntingtower openly married Miss Burke. She says that various people believed she was the right Lady Huntingtower, pitied her, and assisted her. I think this very likely, for there are always people who, from a generous feeling, will help one whom they think oppressed, and always people who will take up as a speculation causes likely to lead to a lucrative compromise. Now, it is the law of England that, when a wife is turned off by her husband without fault of hers, and left destitute, she carries with her an authority implied by law to pledge her husband's credit for necessities proper for the wife of a man in his degree. On this doctrine Mr. Jarrett acted; he supplied Elizabeth Acford with necessities certainly by no means in excess of what would have been proper for the wife of the eldest son and heir apparent of an earl, and then brought an action against Lord Huntingtower for those as supplied on his credit to his wife, who as such had pledged it. The action was tried before Baron Alderson at the Kingston Spring Assizes, 1853. At that time the wife could not be received

as a witness against her husband, and those resting their case on Elizabeth Acford being the wife of Lord Huntingtower could not call her as a witness. But all other evidence that could have been brought forward now could have been brought forward then, and inasmuch as the action was against Lord Huntingtower, everything which he had said or done was admissible as against him, though it would not, unless part of the *res gestæ*, be admissible now. If she, in telling her story to Jarrett and his legal advisers, rested her marriage entirely on habit and repute in Scotland, not bringing forward the story of the ceremony, the inference is strong that the story of the ceremony is a subsequent invention. If she did tell that story, they knew that Frederick Spicer, who was then alive, and Margaret Ritchie, who was then 527] *alive, and with both of whom Jarrett was in communication, were very important witnesses. And they must have known that Mr. Kenrick, who was then alive, and who if not friendly to Elizabeth Acford was at least then hostile to Lord Huntingtower, and Mrs. Kenrick, who then, near thirty years ago, was not likely to have forgotten anything, would be very important witnesses. I do not attach much weight to Lady Dysart being then alive, for she was so hostile a witness that no one would have thought of calling her. If, however, the case put before them was only that of habit and repute, these witnesses probably would carry the case no further than the letters mentioned in the letter of the 5th of February, and they might well hope that they could make such a case from them as to force Lord Huntingtower's counsel either practically to admit the truth of the case, or to call him as a witness and subject him to cross-examination. What evidence they did call we do not know, but they failed in their action. After this Elizabeth Acford went to Ham House, where Lord and Lady Huntingtower resided, and to Grosvenor Square, where Lady Dysart resided, and made such a disturbance that finally it was agreed that an annuity of £60 should be settled on her in her maiden name, she giving up all letters and all claim on Lord Huntingtower, and a formal deed, dated the 3d of May, 1854, and made between Elizabeth Acford, spinster, made in the proper form for securing an annuity to a woman who had been his mistress, but all connection with whom had ceased since the middle of 1848, was prepared and executed by her.

Her explanation of this is given on cross-examination :

I was obliged to do it or starve and see my children die at my feet ; there was no help for it whatever. He said, " I wish you to do it, Lizzie, though it is apparently against yourself ; you know you are my legal wife." He said, " Miss

Burke married me with her eyes open ; she was thoroughly and purely aware that you were my wife ; she knew I had married you in Scotland."

So that your view was that your executing this deed, which described you by your maiden name of Ackford, and described your children as Acford, and in which you covenanted not to molest him at all, would have no effect whatever?—Not the slightest effect. He said it did not matter what I did about that, and that if I signed it in my maiden name it would never invalidate my marriage to him.

At that time you were thoroughly and completely convinced that you were married to him?—Most assuredly.

*How far that prevents the effect of the execution [528 of this deed in shaking her credit your Lordships must judge. In 1857 she and Lord Huntingtower resumed cohabitation. He took a house and maintained an establishment for her whilst he was living with the lady whom he had married in 1851. An agreement was entered into between them in her maiden name as Elizabeth Acford, providing for the education of her daughters. As I have spoken with severity of Lord Huntingtower, it is fair to say that for a time he behaved well and properly to his daughters, and always seems to have been, after his fashion, kind to them, though his later conduct can only be palliated on the supposition that he was insane.

Towards the end of 1859 Lord Huntingtower took up with a woman called Emma Dibble, with whom he lived till his death under various names. Your Lordships will remember that it was in 1860 that Lord Huntingtower finally ceased to live with the lady whom he had married in 1851, and with whom he lived as his wife till then. What follows I will read from the shorthand notes of E. Acford's cross-examination :

You were then convinced that you were his wife?—Certainly. I am still convinced that I had an undoubted right to receive him as my husband.

And you were convinced that your children were legitimate?—Most assuredly.

You had not any doubt about it?—Not the slightest. I felt myself an honorable woman.

Just look at that (*handing a letter to the witness*), is that your handwriting?—Yes.

I will just read you this letter :

"*Sherborne Street,*

"14th December, 1859.

"*Huntingtower*.—If you will give me £1,000 I can get married within a month, and in case the man might do as you have done—leave me to the mercy of the world, an outcast and a beggar—I will thank you to have it all made over to myself, so that I may do with it as I think fit. An early reply will greatly oblige," and then it is signed "Elizabeth." You wrote that letter, did you not?—Yes, I wrote it, and I perfectly well remember it. I know the conversation that I had had with Lord Huntingtower prior to my writing it.

Were you proposing or intending at that time to get married?—Well, I never intended it, but I said to Lord Huntingtower, "You have thought proper to get married again, why should not I?" He said, "If you dare to get married again I will always claim you, and will blow the fellow's brains out," or something to that effect, so I wrote in a playful manner.

This was not seriously written then?—It was not seriously written; it was written in a playful manner. I never felt I was at liberty to marry again, 529] only *I put the question to him when he was with me, and he said, "If you ever marry again I will always claim you, and I will blow the fellow's brains out." That was just his expression, and then in a playful, teasing manner I wrote that letter. I perfectly well remember it.

That letter did not express your real intentions at all?—Certainly not. I did it to tease him.

You knew, did you not, that you would be committing bigamy if you married again?—I was aware that I could not marry again. Certainly I was.

And that you would be committing a crime if you did?—I should be committing bigamy, as I told him he had done.

Then you are quite sure that this was not done seriously?—On my oath, I am sure.

He did not send you £1,000, did he?—No, he never sent me any money in the shape of £1,000 or 1,000 sixpenses. He came to me on the receipt of that letter, and he was very indignant at my conduct, as he styled it.

He was very indignant that you had suggested it?—Yes, that I should think of marrying again.

You suggested, you know, that the money, if it were paid to you, should be settled on you; had you discussed that matter with Lord Huntingtower? Perhaps you do not quite understand me. You suggested in this letter, "I will thank you to have it all made over to myself, so that I may do with it as I think fit."—Yes, I did (*laughing*). I beg pardon if I smile, I cannot help it. I knew it was—

That it was a joke, in fact; that it was meant as a piece of fun?—Yes, it was meant as a piece of fun from beginning to end, because he was telling me this. He said to me, "Dearest, if I had a thousand women to choose from, I should never have met with one like yourself, so quiet and so discreet." I said, "Decidedly more so than you have been, for you have married again and committed bigamy," and I said, "Do not be surprised if I were to do the same."

It was banter and fun?—Yes, there was no seriousness one way or the other. No importance must be attached to it; it was a mere playful bit of foolery between us.

I have not read the whole of this letter. I had not the whole of it copied; I had only the first page.—I do not know, I am sure, what is written there.

I will read it.—If you read it I will acknowledge it.

"P.S. I shall expect that you will allow the children to write to me on the first of every month without coming through your hands; I ought to have heard again from them by this time. E." That is your writing, is it not (*showing the postscript to the witness*)? Yes.

The first sheet is signed "Elizabeth?"—Yes, he would not allow me to sign in any way else.

The postscript is signed, as postscripts generally are, with the initial?—Yes, I acknowledge that, decidedly. I was backward in my hearing from my children.

You were very fond of your children, were you not?—Yes; it nearly broke my heart his keeping them away from me nearly for ten years; he never allowed me to see them hardly.

You would not willingly have done anything to injure your children?—I would have sacrificed my life for them; I did my health.

530] *Was the postscript seriously intended or not?—The postscript was seriously intended.

The first sheet is pleasantry, but the postscript is serious?—The postscript is serious; the other was a piece of foolery done to tease him more than anything else.

Is that your handwriting (*handing a letter to the witness*)?—Yes.

And this also (*handing an envelope to the witness*)?—I will honestly acknowledge everything.

I am quite sure you will; the envelope also is in your handwriting, is it?—Yes.

This is a letter written from 34 Sherborne Street, and dated the 12th of February, 1860; that is a few months after the last?—Yes.

And it is addressed to "P. R. Welch, Esq., 2 Paper Buildings, Temple?"—Yes. That was a gentleman he used to send to me with money.

You knew who Mr. Welch was?—Yes.

A barrister?—Yes, he was a barrister.

And a friend of Lord Huntingtower's?—Yes; he frequently used to call.

Afterwards he was, I think, a commissioner of bankruptcy at Leeds?—I did not know him then; he was practicing in the Temple when I was introduced to him, and for a long time afterwards I used to call there by Lord Huntingtower's request.

He used to give you money sometimes?—Yes, he used to give me money frequently from Lord Huntingtower.

Is Mr. Welch dead?—I heard so.

The letter was read as follows:

"34 Sherborne St.,

"February 12th, 1860.

"Sir,—With reference to the subject that I were speaking with you upon, I beg to repeat that I can get married immediately, and will do so if Lord Huntingtower will give me £500. I have already written to His Lordship upon the same subject. An early answer will greatly oblige,

"Sir,—Yours most respectfully,

"ELIZABETH ACFORD."

"To P. R. Welch, Esq."

That was your letter?—Yes. Mr. Welch was quite aware that I was going to write that letter.

Was that pleasantry?—It was more to get money from Lord Huntingtower than anything else. Mr. Welch was fully aware of it. I do not know that Mr. Welch did not suggest it to me.

You will not swear that, will you?—I should not like to swear it; but I am almost positive that I could. It was merely done in a business transaction; it was never intended. I never entertained seriously anything of the sort. It was merely done for mischief.

Do you represent to their Lordships that that letter was also written in a mischievous spirit?—Most assuredly it was, because I always felt myself married to him, and I always told Mr. Welch so; Mr. Welch said he could say nothing in favor of Lord Huntingtower against it; he told Huntingtower so.

Did you ever say to Mr. Welch, or to anybody else, that at that time you were in a position to get married to a respectable householder in Islington?—I dare say it was said for me.

*Did you say it?—I do not know whether it was in those words or not. [531

Did you tell Mr. Welch, when you were pressing him for money, that you could get married, and that you could get married immediately, if you liked, to a respectable householder in Islington?—Well, I had several offers of marriage from different parties, but they did not know that I was a wife; they thought that I was a widow lady.

The people in Islington thought that you were a widow?—They thought that I was a widow lady; and when I had those offers of marriage I felt quite indignant.

In 1860, or at the latter end of 1859, had you an offer of marriage?—I do not know, really.

Just try and recollect?—I might have had; I really cannot say; I never entertained it.

You had several, had you not, when you were living in Sherborne street?—I might have had.

You might, of course, Madam; but is it the fact that you had?—Yes. Lord Huntingtower made me sign my name like that; he said it was better to do so.

Who did?—Lord Huntingtower; he said, "You had better sign yourself "Elizabeth;" do not sign it "Huntingtower."

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Dysart Peerage Case.

H.L. (Sc.)

It was quite natural that you should have signed it "Elizabeth"; but let me draw your attention to this letter to Mr. Welch. About this time, when this letter was written, did you not tell Mr. Welch that you had had an offer of marriage?—Yes, I did in that letter assuredly.

And by word of mouth?—Yes; if he came to my house I might have done it. By word of mouth, did you not tell him that?—Yes; and I told him he had better tell Lord Huntingtower.

Did you not tell him by word of mouth that you had got a very good offer?—Yes, I think I did.

And that you would get married if Lord Huntingtower gave you a sum of money?—Yes; I did not see why I should not get married, as he had done. I did not see why I should spend my days in abject poverty while Lord Huntingtower had committed bigamy; and Mr. Welch told me if I did I should be prosecuted. He said, "You can tell Lord Huntingtower that, if you like." I said, "I shall certainly tell him, and ask him for money."

When you told him that you had a right to get married as Lord Huntingtower had got married, you were serious in what you said?—I was not serious. I wanted Lord Huntingtower to give me up wholly and solely, or come and live with me altogether. I wanted him all or nothing.

If he would have given you up altogether?—But he would not; he would never give me up; never.

Please listen to me. If he had been willing to give you up altogether, and to give you a sum of money, you were prepared to get married?—I might have done.

You were prepared; this letter says so?—Yes, I had an offer.

What I have said is the truth, is it not?—I had an offer, but I never made up my mind to it.

Of the effect of this in shaking her credit your Lordships must judge.

532] *Then comes a very strange story, into which I shall not enter in much detail. It rests on the testimony of Mrs. Whiting, the eldest and only surviving daughter of Lord Huntingtower, and strange as it is, it is so confirmed by a variety of documents that I believe it. Lord Huntingtower had treated her well and sent her to be educated abroad. In February, 1863, she was sent for by him and brought to the house where Lord Huntingtower was living with Emma Dibble, sometimes under the names of Mr. and Mrs. Digby, and sometimes under the names of Mr. and Mrs. Manners. Then Lord Huntingtower developed a scheme of mingled ingenuity, folly, and wickedness. He told her that her position would be greatly improved if her legitimacy could be established, and that it could be established if she would go to her mother pretending to have run away from Vienna against his will, and instigate her to take proceedings to establish her marriage with him, which would have the effect of setting him free from Miss Burke and establish his daughter's legitimacy. That then her mother, thus proved to be his wife, might divorce him on the ground that he was living in open adultery with Mrs. Dibble, and then he would be able to marry Mrs. Dibble; that any respectable solicitor

would take up her case on speculation, but if not he would furnish the money, but it was to be the most profound secret that it came from him. My Lords, I do not much blame Mrs. Whiting, then a mere child, for doing what a father who had always been kind to her commanded; and I think it superfluous to say anything as to Lord Huntingtower's conduct. Elizabeth Acford would not enter into this scheme, the certain effect of which would have been to destroy her annuity. He then refused to pay it. She brought an action on the annuity deed in her maiden name. He pleaded in bar that she was his wife, which she denied, and the issue thus joined was tried at the Maidstone Spring Assizes, 1865, before the Chief Baron Pollock. She was called as a witness, whether by Lord Huntingtower's counsel or her own does not distinctly appear. I will read what she now says on cross-examination as to her evidence from the shorthand writer's notes:

You were called to prove that you were Lord Huntingtower's wife?—I was not exactly called to prove that; their object, I believe, was to get the money.

Your object was to get the money?—I believe my solicitor's object was to get the money. I do not know that they were prepared to ask the question about my being his wife, or otherwise. [533]

What I want to put to you is this, when you gave your evidence before the court, did you say a word about the ceremony that was performed before Spicer?—No, I did not.

Not a syllable?—No, not in court.

Of course you knew all about it?—Yes, I knew all about it, and I knew I was his wife; but I did not think there was any occasion to say it when the man was claiming me as such. I did not bother about that.

You said no syllable about what we have called the "ceremony"?—No, not in court. I was not called upon to do so.

You were sworn to give evidence, were you not, before you gave your evidence?—Yes.

At that time you knew you were married; you knew that the ceremony had been performed: you knew everything that you have told us to-day, or told us since you began to give your evidence?—I knew it, and I have spoken the truth.

Lord Huntingtower cannot have told his counsel of the contract before Spicer, yet if it had been true, or even if it had been asserted in Jarrett's action in 1853, he must have known it.

On this evidence the Chief Baron directed a verdict for the defendant, subject to leave to move. A rule *nisi* was obtained, but cause was never shown, Lord Huntingtower's counsel having consented that it should be made absolute.

I suppose they explained to Lord Huntingtower that the verdict if it stood would not affect Lady Huntingtower's rights; and that if he, contrary to all probability, succeeded in establishing that his marriage with her was bigamous, her friends would, in all probability, indict him for bigamy; and that after all he would not be a bit nearer his ultimate

object of marrying Emma Dibble, for the Queen's Proctor would certainly intervene and prevent a divorce by collusion. Though Lord Huntingtower had no regard to his character, and I think I may say he had by this time no character in the least worthy of his regard, he would hardly be insensible to the force of these considerations. But, whatever might be the reasons, the verdict was entered for the plaintiff, and she received the money, and her solicitors the costs.

I have, for the reasons I stated before, gone through the evidence at, I fear, tedious length.

If the burthen of proof lay on those denying the first marriage, to prove that Elizabeth Axford tells a falsehood 534] in asserting that *there was a marriage *per verba de presenti* in Scotland in 1844, I think there is ample evidence to justify a finding in their favor. But the burthen of proof being on the other side, and the question for your Lordships being whether the evidence is such, and of so satisfactory a nature, as to satisfy you affirmatively that that there was such a marriage, I think your Lordships cannot hesitate. I, without the least doubt, express my opinion that it is not proved, and I advise your Lordships to find in the same way.

LORD WATSON (after alluding to some of the facts previously given, and stating that he would in future designate the lady styling herself "Elizabeth Dowager Lady Huntingtower" as the petitioner) continued :

It appears from the statements in the case for the petitioner, and it is certainly established by the evidence, that although the marriage of Lord Huntingtower to Miss Burke, in September, 1851, came to her knowledge shortly after its celebration *in facie ecclesiæ* the petitioner took no steps to have the validity of her alleged irregular Scotch marriage of July, 1844, or the nullity of the marriage of 1851, judicially declared; and that the legitimacy of William John Manners and the other children born of the marriage between Lord Huntingtower and Miss Burke was never impeached until these proceedings began in August, 1880. During the twenty-one years which elapsed between the date of their marriage and the death of Lord Huntingtower, and for eight years after that event, Miss Burke occupied, before the world, the position of Lady Huntingtower, his lawful wife and widow, and their children, from the time of their birth, held the unchallenged repute and *status* of legitimacy.

But, however unfortunate that result might be, it is undoubted law that, if it be proved to your Lordships'

satisfaction, that Lord Huntingtower was married to the petitioner in Scotland, and according to the law of Scotland, in the year 1844, his Lordship's subsequent marriage to Miss Burke in 1851 was utterly void, and the issue of that marriage are illegitimate. To use the language of Lord Stowell in the well-known case of *Dalrymple v. Dalrymple* (¹), "the first marriage, if it be a marriage upheld by the *law of the country, can have no competitor in [535 any second marriage which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage; it is a mere nullity."

The burden of proving the alleged marriage of 1844 rests, of course, upon the petitioner; but I venture to doubt whether the *onus*, which is always incumbent on the party alleging an irregular marriage, is increased by the mere fact of the other spouse having subsequently thought fit to contract a regular marriage. If the petitioner, immediately after his marriage with Miss Burke became known to her, had brought a suit against Lord Huntingtower for restitution of conjugal rights, and had, in that action, adduced evidence sufficient, apart from any question of second marriage, to prove her own marriage to Lord Huntingtower, I am disposed to hold that the same evidence would have been sufficient to sustain the validity of that marriage, as in a question with the innocent wife and children of the second. But the second marriage is, in all such cases, an important circumstance, which may, when taken in connection with the conduct of the party challenging it, give rise to a presumption against the reality of the first marriage; and it is a material fact in the present case, that these proceedings have been instituted by the petitioner thirty-six years after the marriage which she seeks to set up, and nine-and-twenty years after Lord Huntingtower's marriage to Miss Burke. It is obvious that, through the delay which has thus occurred, a great deal of testimony bearing on the alleged marriage of 1844, which would have been available seven or eight and twenty years ago, has been necessarily lost. The petitioner's counsel strenuously argued that the circumstances of his client have all along been such that neither she nor her son can be held responsible for that delay; but I cannot accept that argument. Even if their long inaction was owing to their misfortune rather than their fault, that seems to me to be a consideration of no relevancy

(¹) 2 Hagg., C. R., 129.

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in any question with the children of Miss Burke. Their legitimacy was never disputed, they had no notice of the claims now put forward by the petitioner and her son, and had notice been given, it lay with the petitioner and not with them to take the initiative. In these circumstances I 536] am of opinion that the **status* which the wife and children of the regular marriage of 1851 have so long been permitted to enjoy without molestation, raises a strong presumption in favor of their legal right to that *status*, and casts a corresponding *onus* upon the petitioner. Wherever the evidence leaves room for reasonable doubt your Lordships ought, in my opinion, to presume in favor of William John Manners, and against the petitioner and her son Albert Edwin.

The number of cases similar to the present is, happily, not large; but, so far as I am aware, in no other case save one, to which I shall shortly refer, has the challenge of a marriage on the ground that the husband or wife was one of two living spouses of a previous marriage been long delayed. Of the cases cited at the bar, in *Pennycook v. Graite and Grinton* (¹) *Dalrymple v. Dalrymple* (²), and *Longworth v. Yelverton* (³), the challenge was brought immediately after the party alleging the first marriage came to know of the second; whilst in *McGregor v. Jolly* (⁴), a period of nearly two years was suffered to elapse. But in the case of *Wright or Webster v. Wright, Trs.* (⁵), Mrs. Webster, whose paternity was not in dispute, raised, after her father's death in 1833, an action to have it found and declared that he had contracted an irregular marriage with her mother in Scotland about the year 1805. Her mother lived till 1833, but meantime, in 1815, nineteen years before her action was brought, her father had entered into a regular marriage by banns in England, of which issue were born. The late Lord Moncrieff, whose judgment was accepted by the Inner House, held that the proof led was insufficient, and his Lordship thus explains in his note the presumptions which he had, in the circumstances of the case, applied to its consideration. "The English marriage is a fact of very great importance in the cause, as bearing upon the reality of the proof, and affording presumption both of fact and law against any equivocal, doubtful, or suspicious state of the evidence."

(¹) Mor. Dict., 12,677.

(²) 2 Hagg. C. R., 54.

(³) 4 Macq., 745.

(⁴) Court of Session Cases, 1st Series, xv, p. 767.

vol. iv, p. 259; Rev. on app., 3 Wil. & S., 85.

(⁵) Court of Sess. Cas., 1st Series, vol.

The case of the petitioner is that she and the late Lord Huntingtower mutually consented to take, and did accept, each other *as lawful spouses, in the presence of wit- [537 nesses, within a cottage then occupied by his Lordship, in the neighborhood of Edinburgh; and it is beyond dispute that such mutual acknowledgment by a man and woman, between whom no legal impediment exists, with the real and present purpose of becoming spouses, is of itself enough to constitute a marriage according to the law of Scotland. When the deliberate interchange of consent *de presenti* before witnesses has been fully proved, no further evidence is requisite, and no subsequent acts or declarations of the pair can make them other than married persons. As stated by Lord Eldon in the case of *McGregor v. Jolly* ('), "When you are satisfied that, according to the law of Scotland, there has been actually a marriage between A. and B., no subsequent conduct is to be received in order to entitle you to say that that marriage, which has been actually had and actually celebrated effectually, is to be undone." But in cases where there is not *plena probatio* of such an interchange of consent, or in the case of a ceremony being proved, but a doubt remaining *quo animo* it was gone through, it is competent to inquire into the subsequent conduct of the parties towards each other. And if it be found that they afterwards lived together and were habite and repute married persons, and it appear that their cohabitation was referable to the antecedent ceremony, these circumstances will be sufficient to establish that the ceremony was intended to constitute and did constitute *ipsum matrimonium*. On the other hand, if it be found that the subsequent behavior of the parties was not consistent with their having contracted matrimonial relations, that will suffice to discredit the ceremony, and negative marriage.

It appears to me to be essential, in dealing with the evidence in the present case, to keep in view the fact that the petitioner does no allege a marriage by habit and repute. The possibility of such a marriage is excluded by the circumstances of the case. The law of Scotland accepts the continuous cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of Scotland. Cohabitation *further of Scotland will not constitute mar- [538

(') Court of Sess. Cas., 2d Series, vol. iii, at p. 189.

riage, although it may be competently founded on either as corroborative evidence of a ceremony in Scotland, or as evidence that a ceremony proved to have taken place in Scotland was truly intended by the parties as a present interchange of matrimonial consent. Now the petitioner and Lord Huntingtower were certainly not in Scotland, at the time the alleged ceremony took place, for more than a month—a period, in my opinion, short of what is required in order to establish a marriage by habit and repute: and any subsequent cohabitation had by them was in England. And, even assuming that the character of their cohabitation in England was such as would have warranted the inference of marriage if it had taken place in Scotland, the petitioner can take no benefit thereby, unless she can show that such cohabitation was distinctly referable to the alleged ceremony at Grecian Cottage. In my opinion, that ceremony is the leading fact which it lies upon the petitioner to establish, and must be instructed by at least a substantial amount of reliable testimony, independently of inferences which may be drawn from cohabitation in England. To rest the conclusion that a ceremony must have taken place mainly, or in any material degree, upon such inferences, would go far to destroy the principle that a Scotch marriage cannot be derived from English habit and repute.

I shall now proceed to consider the evidence with the view of ascertaining how far it bears out the petitioner's allegation of a marriage in Scotland, *per verba de presenti*. One striking feature of that evidence is that the petitioner herself is the only witness to that which is alleged by her to have taken place at Grecian Cottage, Trinity, and almost the only witness who speaks to the relations subsisting between her and the late Lord Huntingtower before and after their visit to Scotland in the year 1844. The parties to a declarator of marriage *per verba de presenti* having now been, by the enactments of 37 & 38 Vict. c. 64, made competent witnesses, I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect. But it will always be necessary, in a case of that kind, to test very strictly the statements given in [539] evidence by a woman interested *in establishing that she held and holds the honorable *status* of a wife, and not the degrading position of a mistress, and that her issue are lawful children and not bastards. And in that view, and as bearing upon the credit to be attached to the evidence of the

petitioner, the relations which subsisted between her and the late Lord Huntingtower, before her alleged marriage of July, 1844, appear to me to be matter of more than usual importance. When a marriage by habit and repute is sought to be established by a woman who admits, or against whom it is proved, that her cohabitation with her alleged husband began in illicit intercourse, that fact, as was held by this House, in the case of *Cunningham v. Cunningham* (¹), raises a presumption against her, which can only be overcome by strong evidence of a change in the character of this cohabitation. That presumption has not been held to apply, and cannot apply with the same force, when the woman sets up a marriage by declaration of mutual consent before witnesses; but it is nevertheless an important question in this case whether it be the fact the petitioner lived in concubinage with Lord Huntingtower before they went to Scotland. The petitioner denies that she did, but I have come to the conclusion that her statements upon this part of the case are inconsistent with the truth; and that conclusion compels me to regard her testimony, so far as uncorroborated, with suspicion.

The story which the petitioner tells of her introduction to Lord Huntingtower, and of their mutual relations from that time until they met at Grecian Cottage is a very singular one. It would appear that the petitioner, who had been in service at Bathwick Rectory, gave up her situation, in the end of the year 1843, and shortly thereafter became one of the inmates of a house at Southstoke, about five miles from Bath. It is needless to dwell upon the account given by the petitioner of how she came to be there, which is in itself far from satisfactory; but, assuming it to be true, the inference is that she must have been inveigled thither by Lord Huntingtower, upon the false representation that she had been engaged as a servant by his mother, Lady Dysart. What occurred there according to her statement is,—that Lord Huntingtower professed an ardent affection for her, which she did not reciprocate, that she fled to her own room, in [540] order to avoid his importunities,—that his Lordship followed, committed a violent and cruel rape upon her person, and, after his vile purpose had been effected, tried to soothe her by promises of marriage. At first the petitioner would listen to no terms of compromise; but, eventually, all means of escape from the house having been cut off, she accepted his renewed offers of marriage, but refused to have intercourse with him until she became his lawful wife. And the

(¹) 2 Dow., 482.

petitioner solemnly asserts that Lord Huntingtower made no second attempt to have connection with her, and that she maintained her chastity inviolate until she had gone through a ceremony of marriage in Scotland, upon the faith of which she, for the first time, voluntarily submitted to his embraces.

My Lords, it is a remarkable fact that, even in these circumstances, this injured woman should not, the moment she was at liberty to leave Southstoke, have placed herself under the protection of her natural guardians, until such time as Lord Huntingtower was ready to fulfil his promises of marriage. Instead of that she went straight to London, to meet the man who had outraged her, and thenceforward lived in his company at hotels, and in various lodgings taken by him for his own and her accommodation. It is also significant that, from the time she joined Lord Huntingtower in London, the petitioner discarded her maiden name of Elizabeth Acford, and they passed at their different residences for man and wife, being generally known as Mr. and Mrs. Tollemache or Talmash. They must, according to the petitioner's own account, have continued to live together in this fashion for at least four months before they went to Scotland in the summer of 1844. And it does not, in my opinion, detract from the significance of these circumstances that, during that period, the petitioner twice paid a visit to her parents at Bideford, and as often returned to London in order to resume her former course of life as Mrs. Talmash.

Notwithstanding the suspicious character of their cohabitation, as evidenced by her own statements, the petitioner, in her examination-in-chief, took every possible occasion to reiterate the assertion that she had no intercourse with Lord Huntingtower. But, on cross-examination, the petitioner was not only driven to admit that Lord Huntingtower paid 541] visits to her bedchamber during the *night, but declined to negative the suggestion that he had also been in bed with her. From these circumstances, my Lords, it appears to me that only one inference can be drawn by a court of law, that inference being that, during the period in question, the petitioner cohabited with Lord Huntingtower as his mistress.

That such was really the footing upon which the petitioner lived with Lord Huntingtower until July, 1844, derives strong corroboration from the evidence of the witness Mrs. Steggall, formerly Mrs. Kenrick. The petitioner's testimony is to the effect that Mrs. Kenrick knew her position to be that of a chaste single woman, and was also aware of Lord Huntingtower's intention to make her his lawful wife;

that she was actually a boarder in Mrs. Kenrick's house at the time when Lord Huntingtower went to Scotland; and that Mrs. Kenrick overcame her virtuous scruples; persuaded her to go to Scotland for the purpose of being married; and saw her safely on board the steamship Clarence, which conveyed her to Granton. Now, Mrs. Steggall states positively that the petitioner was only known to her as Mrs. Tollemache, and that, on the very first occasion of their meeting, Lord Huntingtower introduced the petitioner to her by that name, and at the same time explained that they had been married in the country only two or three days before he came up to London. No doubt the witness also stated that, at this distance of time, her memory does not retain all that occurred in the year 1844; and her answer to numerous questions put to her, with regard to the allegations of the petitioner, was *non memini*. But I see no reason to doubt that the testimony of Mrs. Kenrick, so far as given affirmatively, is reliable; and whilst that testimony is, in all respects, consistent with the probabilities which the petitioner's own evidence suggests, it appears to me to exclude the idea that the petitioner was leading the virtuous life of a single woman, waiting for admission to the honorable state of marriage.

After some months thus spent in London and its vicinity, it seems to be an undoubted fact that Lord Huntingtower did go to Scotland, and take up his residence at Grecian Cottage, Trinity, near Edinburgh, and that the petitioner followed him. Why they should have gone to Scotland, as the petitioner says they did, for the purpose of getting married there, is a problem of which, in my *opinion, no [542 intelligible solution has either been given by the petitioner, or suggested in argument. According to the petitioner, Lord Huntingtower was always ready and willing to marry her in England, either *in facie ecclesiæ* or before a registrar; and if that statement be true, it is not easy to discern any sufficient cause for resorting to a marriage in Scotland. The reasons assigned by the petitioner are not very consistent. At one time she says that her wretched state of health, occasioned by the brutal conduct of Lord Huntingtower at Southstoke, was the only obstacle to their union; but it is hardly credible that a woman, who was able to move about from place to place in London and its vicinity, and to pay visits in West Devonshire, should be incapable of going through the ceremony of marriage. At other times she says that the delay of their nuptials was owing to the dilatoriness of Lord Huntingtower, a reason which has at least the

merit of greater probability than her own ill health. The suggestion, for it is no more, that Lord Huntingtower wished the marriage to be kept secret, or at least desired to avoid the interference of his family, appears to me to be equally unsatisfactory. His Lordship, at that time, was not only living in entire independence of family control, but, if there be any truth in the petitioner's evidence, he informed his mother, Lady Dysart, that the marriage was about to take place; and, after it did take place, he at once made it known to his relatives and friends that the petitioner had become his wedded wife. There is, so far as I can see, nothing in the evidence adduced for the petitioner, to warrant the inference that Lord Huntingtower either intended to conceal their alleged marriage, or that he had any motive for its concealment. On the contrary, it is of the essence of the case which the petitioner has stated, and has endeavored to substantiate, that, after their return to England, Lord Huntingtower and she were habite and repute married persons.

On her arrival at Granton, in the steamer Clarence, the petitioner was met by Frederick Spicer, his Lordship's valet, and by him escorted to Grecian Cottage. What is said to have taken place there, between her and Lord Huntingtower, is very minutely detailed in the petitioner's own words; but these have been so recently read by my noble friend (Lord 543] Blackburn) that I shall *not repeat them. The alleged ceremony was twice performed, first before Frederick Spicer, and then before Spicer and Margaret Ritchie, the only difference being that, on the second occasion, Lord Huntingtower read, in the hearing of the witnesses, a letter from his mother, Lady Dysart, calling him "a gull" for having taken his wife to Scotland, and intimating that he must in future call the petitioner his wife, and that he "could never marry again." After these formal exchanges of matrimonial consent, the petitioner says they lived together as married persons,—“We cohabited together as man and wife from the hour he made me his wife, by saying these words in the presence of his servants.”

My Lords, if it be the fact that the ceremony thus narrated was actually performed, and that she did at the time rely upon it as constituting marriage, there can be no doubt that the petitioner thereby became the wife, and is now the widow, of Lord Huntingtower, according to the law of Scotland. Whether Lord Huntingtower did or did not contemplate that result is immaterial. “For,” to use again the words of Lord Stowell in *Dalrymple v. Dalrymple* (’),

"surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted."

My Lords, Frederick Spicer is dead, and Margaret Ritchie is also dead, so that the petitioner has had the opportunity of giving her own version of what occurred within Grecian Cottage, Trinity, in July, 1844. But the very graphic and circumstantial account which the petitioner has given before this committee of the ceremony by which it is alleged that she and Lord Huntingtower expressed, before witnesses, their mutual and present consent to marry, when compared and contrasted with the accounts which the petitioner herself afterwards gave of her marriage, has satisfied me that no such ceremony ever took place, and that the idea of a ceremony is an afterthought of very recent origin.

It is necessary to bear in mind that, according to the petitioner's account, Lord Huntingtower, at the time when he communicated to her his project of taking a house [544 in Scotland, and getting married there, explained the Scotch marriage laws to her. She says, "He explained them to me in this way. He said if we went to Scotland, and made a vow before witnesses that we intended to become man and wife, that would be a legal marriage." The petitioner must therefore have expected, when she went to Scotland, that she would there be made the wife of Lord Huntingtower by means of some such ceremony as that which she describes, and she emphatically states that, as soon as the ceremony before Spicer was over, she "was satisfied," adding, "I considered myself from that hour to be the wife of Lord Huntingtower, honorably so; and I am sure I never had any doubt upon it. I felt that it was right and proper, because he had told me so; and then I made inquiries privately, unknown to him, and I was told also that it was a legal marriage." Assuming it to be true that, in consequence of Lord Huntingtower's explanations, and as the result of her private inquiries, she did honestly believe that the ceremony at Grecian Cottage was effectual to constitute a Scotch marriage, and that she did, in reliance upon it, surrender her person to the man whom she had thereby taken for her husband, one can hardly conceive that the petitioner should afterwards have claimed the position of wife upon any other ground. Yet, as I read the evidence, it is the fact that, after they left Scotland, on occasions when it would have

been of the last consequence to establish her marriage with Lord Huntingtower, she did not think fit to divulge that ceremony before witnesses, but alleged a marriage by living with his Lordship in Scotland, and by subsequent repute or acknowledgment. And it appears to me to be also proved, by her own testimony, that she remained silent in regard to that ceremony during all the time that Frederick Spicer and Margaret Ritchie, the witnesses to its performance, were alive and accessible.

After their return to England, Lord Huntingtower seems to have continued in cohabitation with the petitioner for upwards of three years, three daughters being the result of their connection during that period. The third of these children was born on the 14th of January, 1848, and, as I understand her statements, which are not very precise as to 545] dates, shortly after that event, Lord *Huntingtower quitted the society of the petitioner, leaving her and her offspring destitute. In her extremity, the petitioner applied for assistance to Lady Dysart, who for some time made her an allowance of £5 per month. In a letter written by her to Lady Dysart, bearing date the 5th of February, 1849, the petitioner, after acknowledging a letter from her Ladyship, containing a remittance of that amount, thus proceeds:

You say, Madam, in your letter that you should like to know what his Lordship's letters contains that is of importance to me—the all till that he has acknowledged me as his *wife* by living *together* as such in *Scotland*—from that time in the year 1844, he gave me his name, and introduces me as his wife two every one, he himself has had all three of the children *registered* in the name of *Tolle-mache*, and I always considered myself a married woman from that time.

Not one word about an antecedent ceremony before witnesses. On the contrary, the petitioner rests her very confident assertion of a marriage upon their cohabitation in Scotland, followed by acknowledgments of her marriage in England. It is suggested by the petitioner that these statements were merely intended by her to set forth in general terms the fact that a marriage had taken place according to the law of Scotland. If so, it is a singular thing that the writer, who had made private inquiries regarding the law of Scotland, should have selected words expressive of a well-known mode of contracting marriage in that country; and it is equally singular that these words should have been addressed to a lady who, according to the petitioner's own statement, knew that she was married to Lord Huntingtower before their "living together" in Scotland had well begun, and that there should be no allusion whatever to the ceremony, or to that important letter from Lady Dysart to her

son, which is said to have been read on the occasion of the ceremony, in the presence and hearing of the two persons who witnessed it.

Lady Dysart's bounty ceased after a time, and the petitioner and the children then became chargeable to Lambeth Union. A Mr. Jarrett, one of the relieving officers, took an interest in them, and made outlays for their maintenance to the extent of £190, which he sought to recover from Lord Huntingtower, on the footing that the petitioner was his wife. The action, which was tried in 1853, failed, but it is clearly apparent that the information upon *which the suit [546 was brought was furnished by the petitioner, who, in cross-examination, gives this account of it :

Did you hear, about that time, anything said about your having been married to Lord Huntingtower by habit and repute?—Yes.

You heard that?—Yes, every one acknowledged that.

About your having been held out as his wife to people in Scotland?—Yes.

That is what they wanted to prove, is it not?—Yes, I believe so, in order for Jarrett to get his money.

According to the petitioner's statement, Mr. Jarrett and his solicitors were in communication with Frederick Spicer and Margaret Ritchie; but her own evidence makes it to my mind clear that they were referred to merely as persons capable of proving habite and repute in Scotland, and not as witnesses to the ceremony which she now alleges.

Some years afterwards, apparently about 1860, the petitioner was in frequent communication with a gentleman of the name of Welch, a friend of Lord Huntingtower's, who used frequently to give her money from his Lordship. The petitioner says she informed Mr. Welch that she, and not Miss Burke, was the lawful wife of Lord Huntingtower; and this is her own account of the information which she so gave :

Had you told Mr. Welch before this date that you had become Lord Huntingtower's wife by living in Scotland with him?—Yes.

Did you say to him that you had contracted a marriage by living with Lord Huntingtower for a fortnight in Scotland?—I never said a fortnight; it was more than that we were there.

A fortnight or three weeks?—I might have said that, but it was over that time.

Again, on the occasion of the trial at Maidstone in 1865, the petitioner admits that, when examined as a witness, she did not say a word about the ceremony before Spicer; but her omitting to make mention of the ceremony at that time is not of much consequence, in my opinion, because the petitioner was then suing as a single woman, and it does not appear that she then asserted any claim to the position of Lord Huntingtower's wife.

There is one more passage in the petitioner's evidence bearing upon this matter of the ceremony, to which I must refer. At the time when she was deserted by Lord Huntingtower, and subsequently, for a considerable period, the 547] petitioner lodged with *Miss Pottle in Kennington Lane, and she stated that she told her landlady all about her marriage in Scotland. The petitioner then states as follows:

Did you describe to her (Miss Pottle) the ceremony that was performed?—No, I did not tell her, that I know of.

Afterwards, did you tell Mr. Jarrett about this ceremony?—I think I did.

You know what I mean by the "ceremony," the declaration?—Yes, by which the arrangement was made for me to become his wife.

That is to say, the declaration before Spicer and Margaret Ritchie?—Yes, I think I did.

You told them all about that?—I told them all about that.

Is it not the fact, Madam, that you have said all along that you were married to Lord Huntingtower by having lived with him for a fortnight or three weeks in Scotland?—I never stated any time. I said "I lived with him to become his wife in Scotland."

Have you not stated several times to different people that the way in which you became his wife was by living with him for some time, or for a short time, in Scotland?—I dare say I have done so.

Did you ever say anything about this ceremony?—Yes.

To whom?—I told my friends so?

Will you give me some of their names?—I told my mother.

Anybody else?—I told my sister.

Your sister?—My married sister.

Anybody else?—I dare say a number of people. I dare say I might have done. Mrs. Kenrick was fully aware of it too. They received letters from Lord Huntingtower.

I cannot regard that as a straightforward truthful statement. The most favorable construction for the petitioner which I can put upon it is, that the petitioner having begun by first "thinking," and then boldly asserting that she told Mr. Jarrett, and some other person whom she does not name, all about the ceremony, then goes on to admit her having stated all along that she was married by living in Scotland with Lord Huntingtower, and that, so far as she can recollect, the only persons whom she told about the ceremony were her mother and her married sister, although she may also have spoken about it to some people whom she has forgotten.

My Lords, I cannot in these circumstances believe that the alleged ceremony of marriage at Grecian Cottage, Trinity, ever took place. When she and her children are starving in 1849, though anxious to satisfy Lady Dysart that she had become the lawful wife of Lord Huntingtower, she says 548] nothing about it. *When her friend and benefactor, Mr. Jarrett, is attempting, in 1853, to recover from Lord

Huntingtower his advances made for her support, she says nothing about it, and though both Spicer and Richie were then alive, leaves Mr. Jarrett to allege and fail in proving a marriage by habit and repute. She seems to have reserved the ceremony as a foundation for claiming the honors of Dysart and Huntingtower on behalf of her children, and to have confided it, in the meanwhile, to no one except her mother, a married sister, and possibly to some other persons unknown.

There having been, according to the view which I take of the evidence, no ceremony of marriage in Scotland, the petitioner's case entirely fails. But I think it right to advert to the mutual relations which subsisted between Lord Huntingtower and the petitioner, subsequent to her arrival at Granton in 1844, which do not appear to me to be calculated to suggest that they were married persons.

It seems to be established that, from the time the petitioner went to Scotland, Lord Huntingtower continued to live in her society, until he left her at Miss Pottle's lodgings in 1848. After that date they never lived together. The petitioner understood that Lord Huntingtower went to America, shortly after he left her; and at all events she did not see him until after the celebration of his marriage with Miss Burke. In 1854, a deed of covenant was executed, under which an annuity of £60 was settled by Lord Huntingtower upon the petitioner; and in 1857, a deed of agreement was entered into, by which his Lordship obtained the custody and undertook the education of their children. The petitioner was a party of both these deeds, in the character of spinster, and under her maiden name of Elizabeth Acford. The petitioner had various interviews with Lord Huntingtower before, and also at the time when the first of these deeds was executed; but from that time they never met until shortly before the date of the second deed, when the petitioner states that he began to visit her occasionally, and have intercourse with her, and that he continued to do so until 1863, when their intercourse finally ceased. According to the petitioner two children were the fruits of this intercourse, the one a boy, who was born and died in the year 1858, and the other her infant son, Albert Edwin, born on the 15th of *February, 1863. It [549 may be doubted whether, on the assumption that the petitioner was married, the evidence is sufficient to establish that Albert Edwin owes his paternity to Lord Huntingtower; but that is a point which it has become unnecessary to decide.

The petitioner alleges in her case that, after the ceremony at "Grecian Cottage," "the petitioner and the said Lord Huntingtower cohabited together as husband and wife, and were habit and repute husband and wife." That allegation cannot apply except to the period of three years and upwards during which they did cohabit. It can have no application to the time when Lord Huntingtower is supposed to have been in America, or to the period following his marriage in 1851. Even when so limited, the allegation appears to me to have been made either upon an erroneous estimate of the evidence which the petitioner was about to lead, or under a misapprehension of what constitutes habit and repute according to the law of Scotland. In justification of these remarks, I cannot do better than refer to the definition given by Lord Westbury in the Breadalbane marriage case, *Campbell v. Campbell* (¹), of that which constitutes habit and repute in the marriage law of Scotland. His Lordship says, "It is the holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relations, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation."

I am unable to find aught in the conduct of the parties, subsequent to the alleged ceremony, which can satisfy the definition which I have just cited. Taking the petitioner's own statement, there was nothing in the manner of their life to indicate to the world that their relations to each other had undergone any change. At hotels, and in the lodgings which they occupied, they were still known, as they had previously been, as Mr. and Mrs. Talmash; but, whilst Mr. Talmash was in the constant habit of visiting his relations and friends, in his proper character and under his proper title of Lord Huntingtower, Mrs. *Talmash never accompanied him on any of these occasions. According to her own evidence, the petitioner had no personal acquaintance with the members of his Lordship's family, or with the friends and intimates of the Dysart family, and was never received or recognized by them as the wife of Lord Huntingtower. There is no reason to doubt that the petitioner was present, as Mrs. Talmash, on the occasion of entertainments given by Lord Huntingtower, as Mr. Talmash, to some of

(¹) Law Rep., 1 H. L. Sc., at p. 211.

his bachelor acquaintances, who were, probably, not very fastidious in the selection of their company, when the ladies of their own family were not present. But, during the whole course of this so-called habit and repute, the petitioner was never introduced to a female relative of these persons; and, so far as I can find, she never paid visits to, or was visited by, a respectable female friend of Lord Huntingtower, unless it were Mrs. Kenrick, whose acquaintance with her as a married woman commenced, unfortunately, before they had been in Scotland.

The position and conduct of the petitioner, during the long term of years which followed her desertion by Lord Huntingtower in 1848, so far from supporting, is subversive of the theory of a previous marriage. After 1848 there could be no habit and repute, because there was no matrimonial cohabitation, which is the only foundation upon which habit and repute can rest. And after the 26th of September, 1851, the *status* and repute of wife attached exclusively to the lady who upon that day was married, *in facie ecclesie*, to Lord Huntingtower. So far as the written evidence goes, it proves that, after her desertion in 1848, the petitioner wrote to Lady Dysart as Elizabeth Ackland. She says, no doubt, that Lady Dysart refused to correspond with her if she took the name of Tollemache or Huntingtower, and requested that she should take the name of Ackland, as being nearest her maiden name of Acford; but that assertion is plainly contradicted by a contemporaneous writing under the petitioner's hand. Then, after Lord Huntingtower's marriage to Miss Burke, the letters written to her by Lord Huntingtower are all addressed to her in her maiden name. And, what appears to me to be of much more importance, the petitioner in the year 1854, as Elizabeth Acford, became a party to the execution of a formal deed of covenant, *which sets forth in express terms that she had illicit [55] cohabitation with Lord Huntingtower for some time previous to the year 1849, and that such cohabitation had wholly ceased at or about the middle of the year 1848. The petitioner held by that deed, and either received or recovered by legal process from Lord Huntingtower the annuity payable to her under it, until his Lordship's death in 1872, after which she preferred her claim against his estate. Again, the petitioner, on the 14th of December, 1859, wrote to Lord Huntingtower in these terms: "Huntingtower, if you will give me £1,000 I can get married in a month, and in case the man might do as you have done, leave me to the mercy of the world, I will thank you to have it all made over to my-

self, so that I may do as I think fit." This application was unsuccessful, and two months afterwards, upon the 12th of February, 1860, she wrote to Mr. Welch: "With reference to the subject that I was speaking with you upon, I beg to repeat that I can get married immediately (*sic.*), and will do so if Lord Huntingtower will give me £500." These two letters speak for themselves, and require no comment.

It is true, no doubt, that the petitioner states that she subscribed the deed of 1854 under the pressure of poverty, and in the belief that it could not do away with her marriage; and she likewise explains that her letters to Lord Huntingtower and Mr. Welch about getting married immediately, were not seriously intended, but were written "in a playful manner." It would, in any case, require something more than the unaided testimony of the petitioner to explain away the obvious meaning of writings such as these; and it appears to me to be impossible, in the present case, to receive the improbable explanations which she gives in, order to make the facts tally with her own story. The petitioner can hardly expect to be permitted to corroborate her own tale, by herself explaining away or contradicting all the evidence which conflicts with her testimony.

Thus far, the history of the relations between Lord Huntingtower and the petitioner after the alleged ceremony at Grecian Cottage is decidedly unfavorable to the petitioner; and it is right that I now advert to certain parts of the evidence, which were, with great moderation and propriety, 552] pressed upon *your Lordships by the petitioner's counsel, as supporting her credibility, and as tending to show that a marriage did take place in Scotland between her and Lord Huntingtower. These depositions, strictly speaking, belong to the legal category of acknowledgments of marriage, rather than that of habit and repute.

First of all comes the acknowledgment by Lord Huntingtower that the petitioner was his wife, made to Horne, the policeman, at Grecian Cottage. The words which Lord Huntingtower is said to have used on that occasion are these: "She knows very little of Scotland yet, we are here on our marriage tour." He did not say that they had come to Scotland to be married, or that they had just been married in the cottage where the conversation with Horne took place. On the contrary, the words used were plainly calculated to convey the impression that, having been married elsewhere, they had come to Grecian Cottage in the course of their marriage jaunt; and they are very like a repetition of the statement previously made by Lord Huntingtower to Mrs.

Kenrick, to the effect that they had been married "down in the country" before they first came to London.

Then there are acknowledgments by Lord Huntingtower at hotels, and at a linen-draper's shop in Dover, not that there had been a marriage in Scotland, but that Mrs. Talmash, by which name the petitioner then went, was his wife. It is needless to say that such acknowledgments are valueless as evidence in a question like the present, and are *per se* not more conclusive of marriage than of concubinage. When a man takes his mistress with him to an hotel, or goes with her to a shop to buy baby linen, the probability is that he will prefer describing her as his wife to explaining her true position.

For reasons somewhat analogous, the statement made by Lord Huntingtower to General Harrison in 1847 does not appear to me to be of any importance, and if it were, the petitioner is placed in this dilemma, that if she admits the truth of that statement and founds upon it, she must necessarily admit that her own statement on oath, as to the rape committed at Southstroke, is false.

By far the strongest fact proved in the petitioner's favor, according to my view of the case, is the registration by Lord Huntingtower, in January, 1847, of the birth of their daughter *Elizabeth Frances, as the lawful child of W. L. [553 Talmash and Elizabeth Talmash, formerly Acford. It does not rest on the testimony of the petitioner; but it is only a single isolated incident in a long course of events with which it is not easily reconcilable; and it dwindles to the very smallest *scintilla*, when contrasted with the mass of evidence to which it is opposed.

I think it is proper, in this connection, to refer to the plea stated by Lord Huntingtower in the action brought by the petitioner for a quarter's annuity due to her under the deed of 1854, which was tried at Maidstone Assizes in the year 1865, and which may be regarded as part of the *res gestæ*. The evidence discloses certain painful circumstances which readily suggest the motive which prompted Lord Huntingtower, at that time, to meet the action raised by the petitioner, in the character of his discarded mistress, with the defence that she, and not Catherine Burke, Lady Huntingtower, was his lawful wife. How that scandalous proceeding can assist the petitioner in her present contention, I fail to comprehend. She resisted the plea in defence, as a mere pretext for defeating her just claims under the deed of 1854; and eventually—Lord Huntingtower having withdrawn the allegation, which he ought never to have made—she obtained

decree for the termly payment then due to her in respect of her illicit intercourse with Lord Huntingtower, which had terminated in the year 1848.

Another point fairly urged in behalf of the petitioner was, that Lord Huntingtower forcibly took from her his letters which she had carefully preserved, as affording evidence that they had been married in Scotland. I do not doubt that, in an action for setting up that marriage, instituted before September, 1851, that fact, if proved, would have laid a heavy *onus* on Lord Huntingtower; and I am disposed to hold that, if satisfactorily proved now, it would entitle the petitioner's testimony to a somewhat more favorable consideration at your Lordships' hands. But the alleged abstraction of these letters rests upon the single testimony of the petitioner, and does not appear to me to be satisfactorily proved, or proved at all. The important letters were obviously and necessarily those which the petitioner had received from Lord Huntingtower before his 554] desertion of her in 1848, and her account *is that, about the time of her confinement, on the 14th of January, 1848, he took from her the whole of the letters then in her possession, burnt some in her presence, and carried away the rest, which she never saw again; then on the very day he finally left her at Miss Pottle's, she says that Lord Huntingtower broke open her dressing case, and took away all the letters he had written to her after the 14th of January, 1848. I am unable to give the slightest credit to these statements, when I find the petitioner, on the 5th of February, 1849, some months after their alleged abstraction and partial destruction, in a letter to Lady Dysart, expressing her willingness to give up these very letters, and giving a description of their contents; and, if the description so given was according to the truth, which I see no reason to doubt, they would not have aided, but would have contradicted the case which the petitioner has now endeavored to make, and it is to that fact, and not to any act of Lord Huntingtower's, that I feel constrained to attribute their non-production in these proceedings. Nor am I able to accept the petitioner's statement that in 1854 she gave up to Mr. Shephard "dozens of letters," such as a "husband would write to his wife," because it is perfectly plain that they did not correspond on these terms, in the interval between her desertion in 1848 and the date of the deed of 1854.

It is also observed, in fairness to the petitioner, that, from the time she was deserted by Lord Huntingtower in 1848 until she subscribed the deed of covenant of 1854, she

did not cease to maintain that she was the lawful wife of Lord Huntingtower, although she did not take any judicial steps for the vindication of her rights. That is a circumstance favorable to the conclusion that she did at one time entertain the belief that she was married to Lord Huntingtower. But her belief during that period was founded upon the notion that living together for three weeks in Scotland, followed by cohabitation in England, and the kind of acknowledgments to which I have already referred, was sufficient to constitute a marriage, and, accordingly, she asserted her marriage upon these grounds alone. Had the petitioner's testimony in the present case been to that effect only, whilst holding that she was under error as to the law of Scotland, I would, at least, have given her credit for having spoken the truth.

*My Lords, such being my views of the evidence, [555 I have come without difficulty to the conclusion, not that the petitioner's proof has fallen short of what the law requires, leaving a suspicion that there may be some foundation for her story, but that it completely disproves the allegation of a marriage between her and the late Lord Huntingtower.

I have only to add that, in my opinion, the petitioner, William John Manners, has fully established his right, as the only son and heir of line of the late Lord Huntingtower, to the vacant titles, honors, and dignities of Earl of Dysart and Lord Huntingtower in the peerage of Scotland.

LORD SELBORNE, L.C.: My Lords, it is a satisfaction to me to have heard the opinions of my noble and learned friends on the effect of the evidence in this case, which relieve me from the necessity of doing more than shortly to express my agreement with them.

If the statements of Elizabeth Acford as to the promises and declarations of Lord Huntingtower before the visit to Scotland were to be taken as true, I could myself draw no other inference from them than that Lord Huntingtower did not intend, in Scotland or elsewhere, to contract a legal or binding marriage with Elizabeth Acford. He was his own master, and was evidently quite independent of all moral or other control of his parents. There was nothing whatever to prevent him from marrying in England, either in church or in the registrar's office (as Elizabeth Acford says he talked of doing), except the fact that any such marriage would have been legal and binding. Having, according to the evidence, gone to Scotland on no other business, the shortest, easiest, and best known way of contracting a

Scotch marriage from England at that time, would have been by going to Gretna Green; but there, also, a record of the marriage would, I believe, have been preserved, and there could have been no subsequent escape from it. The motive of avoiding such irreconcilable offence to his parents as a marriage of this kind might give, may have been a powerful reason why he should not contract it: and it is evident to me, from the letter to Lady Dysart of the 5th of February, 556] 1849, to which both my noble and learned *friends have adverted, that this motive did operate upon the mind, not of Lord Huntingtower alone, but of Elizabeth Acford also. But the statements to which Elizabeth Acford has pledged herself, are such as to make it impossible for her to allege secrecy as the reason for resorting to an irregular Scotch marriage rather than a marriage in England. For it is a part of her evidence that Lord Huntingtower told her he was furnished by his mother with the money necessary for this journey to Scotland; that he communicated to her its purpose, and the fact of the marriage, which is said to have been its result; and that he read to Elizabeth Acford, and before his servants, a letter from his mother referring to that marriage and to its effect, as making it impossible for him ever afterwards to marry any one else.

I agree with my noble and learned friends who have addressed your Lordships, that if words importing a contract of marriage *de presenti* had been interchanged, as alleged, with a serious purpose of marriage on the part of Elizabeth Acford, and with a secret purpose of deception on Lord Huntingtower's part, he could not have been permitted to set up his own fraud to nullify that contract. But, in order to arrive at the conclusion that there were any such mutual declarations with any such intention or understanding on either side, it is necessary that the statements of Elizabeth Acford should be believed. If I am led by what she states as to the previous words and conduct of Lord Huntingtower, to a clear conclusion that he did not intend to constitute a marriage by what took place in Scotland, I am equally led by the whole course of her own subsequent life and conduct to a not less clear conclusion that Elizabeth Acford also never really understood or believed that a marriage had been constituted by what then took place. Even if there were nothing else to discredit her testimony, I should myself think it right to rely upon the conclusions which I draw from her life and acts—from what she did and what she did not do—rather than upon the account which now, after the lapse of thirty-eight years, and after having been well instructed in the

Scotch law of irregular marriage, she, and she alone, gives of the words said to have been spoken at Grecian Cottage in July, 1844. During the years which followed her first desertion by Lord Huntingtower in 1848, and his marriage to Miss *Burke in 1851, she was in very frequent communi- [557 cation, not only with other persons able and willing to befriend her, but with several solicitors: more than one action was brought, in which proof of the facts now alleged by her would have been extremely important, and could not have been difficult if those facts had really occurred. The persons in whose presence she alleges the Scotch marriage to have been contracted and acknowledged, and others who could have corroborated that story, if true, were not only then living, but were in actual communication with the solicitors of those who took up her cause, and who were interested in the proof of her marriage. All the evidence which those persons could give was then known; and, nevertheless, Jarrett's action failed; and no attempt was made to claim for her the *status* and rights of a wife by any proceeding in the matrimonial court of this country. She contracted, as a single woman, with Lord Huntingtower through the agency of solicitors who must have known all the facts; she wrote letters in which she professed to contemplate the use of her freedom to contract marriage with any other person, if Lord Huntingtower would agree to certain pecuniary conditions.

Your Lordships have sufficiently adverted to the strong evidence afforded by the letter to Lady Dysart of the 5th of February, 1849, and to other proofs, that whenever she thought it expedient to talk about a Scotch marriage, either to extract pecuniary help from Lord Huntingtower's family, or for any other reason, she used language pointing to mere cohabitation as husband and wife in Scotland (or speaking technically, to "habit and repute") and not to any contract *per verba de presenti*; and I hold it to be impossible that she could have done so, if the words, now alleged to have been spoken, had been actually spoken, with the intention, belief and understanding on her part that she and Lord Huntingtower then and thereby actually, and antecedently to any matrimonial cohabitation, became husband and wife.

I cannot but add that her positive statement that Lady Dysart in 1848 suggested to her the assumption of the name of Ackland instead of Axford is clearly disproved by a letter to Lady Dysart under her own hand, which she attempted to repudiate, though the identity of the handwriting with that of her other letters is *unquestionable. This [558

incident may not, in itself, be of much importance; but the untruth can hardly have been without a motive; and it would have been strange if Lady Dysart had really suggested the use of another name, instead of Acford, believing her to be unmarried.

A still more important contradiction to the whole story which she tells as to the original circumstances of her connection with Lord Huntingtower appears to me to be contained in the same letter to Lady Dysart (of the 5th of February, 1849), which has been so often referred to. She there says:—"He has often said, if I did not feel quite safe, he would take me to an English church and make me his wife openly, as he could not be happy without me; but that he should be discarded by his family, but that he did not mind. But, out of feelings to his noble family and birth, I did not wish him to do so; as I have often told him, if he had married a lady in his own sphere, it would have been a comfort to himself and friends; but this I could not persuade him, *both before and since the fatal occurrence* that took place between us." To these words, "the fatal occurrence," only one meaning can be attached. She therefore here represents that before as well as after Lord Huntingtower had prevailed over her virtue, she endeavored to persuade him to make a marriage suitable to his rank—a representation which I cannot very easily reconcile with her present evidence as to what took place at Southstoke. But this is not all; the letter proceeds thus:—"If I had studied my own interest and future respectability more than I did in that case, I should now have been a happy woman. I could not bear the thought of one so noble as himself to share the fate with one so humble, if his family should discard him." I forbear saying more as to this passage, than that I think it could not possibly have been written by any woman who had not been (by some means) prevailed upon to *consent to* an intercourse which she knew to be illicit; that it seems to me absolutely irreconcilable with the story now told of brutal violence and ineffectual resistance in the first place, and absolute non-intercourse from that time forward, till the connection had become lawful by a ceremony understood and intended to have, and legally having, the effect of marriage in Scotland.

559] *The case, therefore, of the opponent having failed, it only remains that I should move your Lordships, as I now do, to resolve that the petitioner William John Manners has made out and established his right to the dignities of Earl

of Dysart and Lord Huntingtower, in the peerage of Scotland, as claimed by his petition.

The same was agreed to.

The said resolution was subsequently reported to the House, and it was *agreed to*, and *resolved* and *adjudged* accordingly; and resolution and judgment to be laid before Her Majesty by the Lords, &c.

Lords' Journals, March 7 and 8, 1881.

Agent for petitioner, Elizabeth, styling herself Dowager Lady Huntingtower: *Hermann H. Myer*.

Agents for petitioner, William John Manners, Earl of Dysart: *J. A. Bertram & Edward Walmsley*.

See 11 Eng. R., 711 note; 17 id., 86 note; 33 id., 7 note; 18 Amer. L. Reg. (N.S.), 639 note; 31 N. J. Eq., 194 note; 33 id., 277 note.

In this State, marriage is nothing more nor less than a civil contract: *Hynes v. McDermott*, 7 Abb. N. C., 98.

It is a general and universal law, that all that is essential to constitute a marriage between parties competent to contract it, is their mutual consent to enter into the marital relation. This consent must be clearly expressed and made known, but no particular ceremony, or form of words, or cohabitation, is essential to constitute the marriage. This general law will be presumed to be the law of any civilized country until a qualifying or restrictive law of that country is shown: *Davis v. Davis*, 7 Daly, 308.

An agreement between parties competent to contract that they would live together as man and wife, followed by actual cohabitation, constitutes a valid marriage without solemnization before a minister of the gospel or an officer of the law.

Missouri: *Dyer v. Brannock*, 66 Mo., 391.

Any mutual agreement between the parties to be husband and wife *in presenti*, followed by cohabitation, constitutes a valid and binding marriage, if the parties are under no legal disability to contract matrimony: *Blanchard v. Lambert*, 43 Iowa, 328.

Under Gen. St., c. 61, marriage is a civil contract, of which consent is the essence. A mutual agreement between competent parties, *per verba de presenti*, to take each other for husband

and wife, deliberately made and acted upon by living together professedly in that relation, is sufficient, without any formal solemnization or ceremony, to give it validity in law: *State v. Worthingham*, 23 Minn., 528.

Where the statute does not prohibit or declare void a marriage not solemnized in accordance with its provisions, a marriage without observing the statutory regulations, if made according to the common law, will still be valid: *Port v. Port*, 70 Ills., 484.

The statute does not prohibit or declare void a marriage not solemnized in accordance with its provisions. A marriage without observing the statutory regulations, if made according to the common law, will be good: *Hebblethwaite v. Hepworth*, 96 Ills., 126.

A marriage *per verba de presenti*, though not formally solemnized, and not followed by cohabitation, must be deemed valid under the civil law: *Davis v. Davis*, 1 Abb. N. C., 140.

Where a form or ceremony of marriage has been proven, it is *prima facie* evidence of marriage, and the burden of proof to show that the form or ceremony did not include the necessary elements to constitute a marriage, is upon the party disputing the marriage: *Davis v. Davis*, 7 Daly, 308.

The facts that the parties went to a distance for the purpose of solemnizing a clandestine marriage, and that the plaintiff always spoke of the transaction there had, as a marriage, although insisting that it was void because had under assumed names, raise a sufficient presumption that the transaction

was *per verba de præsenti* rather than *de futuro*, to overcome the contrary presumption arising from the fact of a subsequent marriage to another person: *Davis v. Davis*, 1 Abb. N. C., 140.

A ceremony, performed by a man and woman in good faith as a marriage rite, no third person participating, and no magistrate or minister, nor any person believed to be such, being present, and neither party being a Friend or Quaker, does not constitute a valid marriage under the laws of this commonwealth: *Com. v. Munson*, 127 Mass., 459.

Query, whether, there being no prohibitory language in the statute, a so-called common law marriage is valid in Rhode Island: *Peck v. Peck*, 12 R. I., 485.

By the common law, if the contract is made *per verba de præsenti*, it is sufficient evidence of a marriage. If it be made *per verba cum copula*, the *copula* is presumed to have been allowed on the faith of the marriage promise, and that the parties, at the time of the *copula*, accepted of each other, as husband and wife; but this is only a rule of evidence, and it is always competent, in such cases, to show that the fact was otherwise: *Port v. Port*, 70 Ills., 484.

By the common law, if the contract be made *per verba de præsenti*, it is sufficient evidence of a marriage, or if made *per verba de futuro cum copula*, the *copula* will be presumed to have been allowed on the faith of the marriage promise, if at the time of the *copula* the parties accepted each other as husband and wife. It is the consent of the parties, and not the concubinage, that constitutes valid marriage: *Hebblethwaite v. Hepworth*, 98 Ills., 126.

Cohabitation following a marriage promise is *prima facie* evidence, but not conclusive, of consent between the parties to become husband and wife *de præsenti*: *Peck v. Peck*, 12 R. I., 485.

A contract of marriage *per verba de futuro*, while it may give an action, is not evidence of valid marriage; nor are the relations of the parties changed by the fact that cohabitation may have followed the promise to marry at a future time. A contract of marriage in the future, even when the parties may afterwards cohabit, is not understood to constitute marriage, unless the parties at the time of the cohabitation ac-

cept each other as husband and wife, and so conduct themselves that that relation is understood and acquiesced in by relatives and other acquaintances: *Hebblethwaite v. Hepworth*, 98 Ills., 126.

Betrothal by copulation does not make the common law marriage, "*per verba de futuro cum copula*," when the parties looked forward to a formal ceremony, and did not agree to become husband and wife without it: *Peck v. Peck*, 12 R. I., 485.

It is improper to charge the jury that "a marriage was good without any ceremony, and by the consent of the parties, if the parties intended marriage, and that intent sufficiently appears." It is deficient in not adding that such consent and intent must be followed up by actual cohabitation thereunder as man and wife: *Taylor v. The State*, 53 Miss., 84.

Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent: *Williams v. Williams*, 18 Amer. Law Reg. (N.S.), 629, 46 Wisc., 484.

It was therefore error, where the parties originally under a void contract of marriage, to refuse to charge that if the subsequent conduct and declaration of the parties arose from and was the result of such void ceremony, that there could be no presumption of a subsequent marriage: *Williams v. Williams*, 18 Amer. Law Reg. (N.S.), 629, 46 Wisc., 484.

The policy of the law favors matrimony and legitimacy rather than concubinage and bastardy, and hence every reasonable presumption should be allowed to support the former, and to defeat the latter: *State v. Worthingham*, 23 Minn., 528.

The cohabitation of two persons of different sexes, and their behavior, in other respects, as husband and wife, always afford an inference, of greater or less strength, that a marriage has been solemnized between them; yet such inference is destroyed by evidence that no marriage, in fact, ever was solemnized: *Port v. Port*, 70 Ills., 484.

Proof of matrimonial cohabitation, declaration of parties and reputation

that they are man and wife, is sufficient to found a presumption of marriage, and a prior marriage may thus be presumed, although there was a subsequent actual marriage between the parties : *Betsenger v. Chapman*, 88 N. Y., 487.

The presumption of marriage from a cohabitation, apparently matrimonial, is one of the strongest known to the law, especially in cases involving legitimacy. Where there is enough to create a foundation for the presumption, it can be repelled only by the most cogent and satisfactory evidence : *Hynes v. McDermott*, 91 N. Y., 451.

Where coverture is relied on to save an action from the bar of the statute of limitations, the marriage may be shown by proof of cohabitation as husband and wife : *R. R. Co. v. Cobb*, 35 Ohio St. R., 94.

Cohabitation and reputation are not marriage, but only circumstances from which a marriage may be presumed, and this presumption may be rebutted and wholly disappears, in the face of proof that there has been no marriage in fact : *Hunt's Appeal*, 86 Penn. St. R., 204 ; *Harbeck v. Harbeck*, 4 Month. L. Bull., 43.

The general doctrine is, that if parties live together ostensibly as man and wife, demeaning themselves towards each other as such, and especially if they are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. But as in such cases a legal marriage is only presumed from general repute and habit, that presumption has its limits, and may be overcome in particular cases by counter evidence or counter presumption : *Jones v. Jones*, 48 Md., 391.

Where the presumption of a lawful marriage, founded simply upon habit and repute, is met by the counter presumption of innocence, the former must give way, and the law then requires that the first alleged marriage as an actual fact shall be established by more direct proof : *Jones v. Jones*, 48 Md., 391.

Persons having a husband or wife living are not competent to contract marriage, and no presumption of a marriage can be indulged from cohabi-

tation by such persons : *Hebbblethwaite v. Hepworth*, 98 Ills., 126.

See *Spicer v. Spicer*, 16 Abb. Pr. (N. S.), 112.

Where a party has contracted a valid marriage and then marries a second time, his cohabitation and acknowledgment of the marriage relation between him and the second wife is not evidence of the validity of the second marriage : *State v. Whaley*, 10 So. Car., 500.

The mere fact of cohabitation under an honest, though mistaken, belief that the parties cohabiting are lawfully married, will not support an indictment under the Gen. St., ch. 185, s. 6, for lewd and lascivious cohabitation, if the cohabitation is not under such circumstances as to create a common scandal, or tend to corrupt the public morals : *Com. v. Munson*, 127 Mass., 459.

A marriage in good faith, when the husband erroneously supposes himself to be divorced from a previous living wife, is void and not capable of ratification ; but if a valid divorce be afterwards had, and he and the last woman continue cohabitation in good faith, a presumption of a lawful marriage between them will arise : *Teter v. Teter*, 88 Ind., 494 ; *De Thoren v. Attorney-General*, 17 Eng. R., 72 ; *Estate of Jennings*, 4 Month. L. Bull., 40.

If the marriage was originally void, subsequent marriage will be presumed to have occurred, if the parties continued to cohabit together after the removal of the legal impediment : *Blanchard v. Lambert*, 43 Iowa, 228.

A marriage will, in the absence of countervailing evidence, be presumed to exist so long as both parties live ; and evidence that the husband afterwards, in a remote place, for a long period, cohabited with another woman, and had children by her, and that during all that time she was recognized as his wife, has no tendency to prove a dissolution of the original marriage, and is not admissible for that purpose : *Wiseman v. Wiseman*, 89 Ind., 479.

Where a husband and wife separate, and the former lives and cohabits for years with a woman whom he claims, and who is reputed, to be his wife, the law presumes a divorce from the first wife, and the latter may legally marry again : *Blanchard v. Lambert*, 43 Iowa, 228.

If the woman, in surrendering her

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person, is conscious that she is committing an act of fornication, instead of consummating her marriage, the *copula* cannot be connected with any previous promise, and marriage is not thereby constituted: *Port v. Port*, 70 Ills., 484.

Meretricious relations raise no presumption of marriage, even where, for some temporary object or convenience, the parties assume to third parties the relation of husband and wife. Where a man's mistress is occasionally called by his name, or purchases articles with his knowledge as his wife, that, of itself, raises no presumption of an honorable connection, especially where, in other legal relations, the woman holds herself out as a *feme sole*: *Estate of Howe*, 1 Myrick (Cal.), 100.

In a case involving the question of marriage, where there is no impediment to marriage, and the connection between the parties was illicit in its commencement, it will be presumed to be of the same character; and in order to overcome the presumption, it will be necessary to adduce other evidence than that of the cohabitation of the parties to establish their marriage: *Jones v. Jones*, 45 Md., 144; *Foster v. Hawley*, 8 Hun, 68.

When the evidence shows that at the time of the commencement of the cohabitation and conduct, from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct, without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact, subsequent to the commencement of such cohabitation and conduct: *Williams v. Williams*, 18 Amer. L. Reg. (N.S.), 629, 46 Wisc., 468.

A relation between a man and a woman, which was illicit at the commencement, is presumed to continue so until proof of change; and a marriage, therefore, will not be presumed from cohabitation and reputation, where the relation between the parties was of an illicit origin, in the absence of proof of a subsequent actual marriage: *Hunt's Appeal*, 86 Penn. St. R., 294.

It appeared that plaintiff, when about seventeen years of age returned to her home with an infant, of whom

there was no acknowledged father. When this child was two or three years of age, the mother and B. were living together as husband and wife, and so continued to live until his death: Held, that the evidence did not warrant a conclusion that the cohabitation was illicit in its origin: *Badger v. Badger*, 88 N. Y., 546, reversing 18 Weekly Dig., 85, 25 Hun, 280; distinguishing, *Clayton v. Wardell* (4 N. Y., 230), *Vincent's Appeal* (60 Penn. St. R., 238), *Lyle v. Ellwood* (L. R., 19 Eq. 98), 11 Eng. R., 702.

The presumption that a cohabitation, illicit in its inception, remains such in character during its continuance, is one of fact for the jury, and not one of law: *State v. Worthingham*, 28 Minn., 528.

Under the rule that a connection confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change is established, it is not necessary, in order to establish such a change, to show the precise time or occasion thereof; it is sufficient if the facts show that a change must have occurred transforming the illicit intercourse into cohabitation matrimonial in its character: *Badger v. Badger*, 88 N. Y., 546, reversing 18 N. Y. Weekly Dig., 85, 25 Hun, 280; distinguishing *Clayton v. Wardell* (4 N. Y., 230), *Vincent's Appeal* (60 Penn. St. R., 238), *Lyle v. Ellwood* (L. R., 19 Eq., 98), 11 Eng. R., 702.

S. P., Caujolle v. Ferrie, 28 N. Y., 90; *De Thoren v. Attorney-General*, 17 Eng. Rep., 72.

On the distribution of an intestate's estate after his death, in 1874, held, that the claim of his granddaughter, Rachel, (daughter of his deceased daughter,) to a share, could be resisted by proof of the illegitimacy of her mother, notwithstanding intestate's recognition of Rachel's mother as his daughter by an entry in the family Bible, and also in other ways; and notwithstanding, also, that intestate, his wife and daughter (Rachel's mother) are all dead, and that Rachel's mother's legitimacy was never questioned until after the death of her father and mother and herself, and not until the intestate's (her father's) estate was about to be distributed: *Bussom v. Forsyth*, 32 N. J. Eq., 277.

If after the birth of a person claim-

ing to be a legitimate child of his parents, though born as a bastard, there be cohabitation of his father and mother, the latter assuming the name of the former, and the parties treat each other as man and wife, and treat the claimant as their child, and they are treated as, and reputed to be, man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection between the parties : *Jones v. Jones*, 45 Md., 144-8.

In proceedings to compel a husband to provide for the support of his wife, whom he had threatened to abandon, the woman testified that she had been married to him for eight years ; that during that time he had lived with her, introduced her to his relatives and acquaintances, and recognized her as his wife. Upon cross-examination she testified she was not married by any person, but that the defendant had always acknowledged her as his wife, and that they had always since the alleged marriage lived together as husband and wife : Held, that the evidence was sufficient to establish a marriage in fact : *People v. Bartholf*, 24 Hun, 272.

This action was brought by the plaintiff, who claimed to be the widow of one William Clark, to recover her dower in certain lands devised by the said Clark to the defendant. The latter denied that the plaintiff was ever married to Clark. Upon the trial the plaintiff gave evidence tending to show that on the 12th of October, 1870, she was married to Clark at his house near Carthage, Lewis county, by a Catholic priest, in the presence of Bridget Foley (her sister), and Catherine Purcell. Two witnesses for the plaintiff, who testified that the marriage ceremony was performed by the priest on the day stated, said that he remained at Clark's house on that occasion about two weeks. The priest died before the trial of this action.

The defendant offered in evidence a register of baptisms kept by the priest at his church in Schenectady, containing entries in his handwriting showing baptisms performed by him, in that city, on the 1st, 8th, 9th, 10th, 16th, and 23d of October, 1870.

Held, that the entries in the book were admissible to discredit the testimony of the witnesses, to the effect that the ceremony took place on October 12th, and that the priest then remained in Lewis county for two weeks.

Held, further, that it was also admissible to show that Bridget Foley, after the date of the alleged marriage, executed a receipt for her sister, and signed it " E. E. Foley, by sister B. A. Foley."

Held, further, that it was proper, on the cross-examination of Bridget, to ask her whether after the date of the alleged marriage, she had not told one Mathews that she had advised her sister to come away from Clark, and not work there any longer, and that she would make her do so.

A witness for the plaintiff testified to a conversation with Clark, in which the latter admitted that he was married to the plaintiff.

Held, that it was proper, on cross-examination, to ask him if he had not subsequently stated that he did not believe that the plaintiff was married to Clark : *Clark v. St. James Church*, 21 Hun, 95.

In an action brought for admeasurement of dower, defendants denied plaintiff's marriage with B., the deceased. No formal marriage or express agreement between the parties was proved. Plaintiff's evidence showed cohabitation continued for a long period of time and up to the death of B., to characterizing by general repute and by conduct and conversation tending to show an intercourse matrimonial instead of meretricious. This was under an assumed name, however, and in another locality ; among his relatives and friends, the deceased occupied rooms and lived as a bachelor, his connection with plaintiff was unknown. Defendants were permitted to prove, under objection and exception, by numerous witnesses, who were the friends and acquaintances of B., but who did not know the plaintiff and were ignorant of her cohabitation with B., that he was reputed to be a bachelor : Held error ; that the repute thus proved did not tend to explain or show the character of the cohabitation ; that while it was proper to prove that B., among his friends and relatives, lived as a single man ; that he was reputed to be un-

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married among those who thus saw him, and before whom nothing had occurred to raise the question, was mere hearsay, which explained nothing: *Badger v. Badger*, 88 N. Y., 546, reversing 18 N. Y. Weekly Dig. 35, 25 Hun, 280; and distinguishing *Clayton v. Wardell* (4 N. Y. 280), *Vincent's Appeal* (60 Penn. St. R., 228), *Lyle v. Ellwood* (L. R., 19 Eq., 98), 11 Eng. R., 702.

C., a widower, after living for several years with a mistress, in 1804 brought E. to his house and lived with her for three or four years, during which time she had a son by him. E. had previously had two illegitimate children by different men, with one of whom she had lived and cohabited for some time. C. called E. his wife, introduced her and treated her as such while they lived together, and said, even after their separation, that they were married. His and her relatives stated frequently that they were married, and in the community they were recognized as man and wife. No record of their marriage appeared, and no witness was present. They separated; E. returned to her relatives, C. giving to her what money he had; no articles of separation were executed. C. was thereafter formally and openly married to L., a respectable widow, with whom he lived and cohabited for thirty-five years, until his death. After their separation, E. joined with C. in deed of his farm, at the request of the purchaser; C. was also procured as father to join in articles of apprenticeship of the son of E. E., after the separation, continued to bear the name of C., and asserted their marriage, but she never made any claims upon C. as her husband. She survived him, but claimed no share in his property as his widow. L. was recognized by the surrogate as his widow and her children shared in his estate, and she drew a pension to which his widow was entitled. About 1820, C. made an entry in his Bible, under the head of "A Register of my Children" which contained the names of his children by his first wife, and of those by L., but did not include his son by E. B., a son of C. by his first wife, in his will called the son of E. his brother. Held, that while the evidence given to show a marriage with E. was sufficient to make out a *prima*

facie case, it was overcome by the opposing evidence; and taken together, the evidence established that C. was lawfully married to L., not to E.: *Chamberlain v. Chamberlain*, 71 N. Y., 428.

A. cohabited with B., and a child, C., was born of this intercourse. He subsequently married D., to whom a child was born, who survived D., but died in infancy. Afterwards A. resumed his intercourse with B., living with her until his death, acknowledging the child, C., as his, but no marriage ceremony of any kind took place between them at any time. D. died seized of real estate, and the descendants of C. claimed it as the heirs of A., alleging that A. inherited it from his deceased child by D. Held, 1. That C. was a bastard child of A. 2. That nothing was done which legitimized C. 3. That the descendants of C. could not claim title as the heirs of A.: *Dyer v. Brannock*, 2 Mo. Appeals, 482.

On an issue of bastardy, testimony of cohabitation between the parents, as husband and wife, at and prior to the birth of the alleged bastard; that they held themselves out as such in their intercourse with the world; that the woman assumed and went by the family name of defendant; that they had reared a family of children under the same name, and otherwise conducted themselves as married people, is competent evidence for the consideration of the jury upon the question of marriage, and sufficient, if not overcome by a preponderance of evidence to the contrary, to support a finding in favor of a valid marriage so as to protect the children against the stain and taint of bastardy, and subject the parents to the duty of providing for their support: *State v. Worthingham*, 23 Minn., 528.

On questions of marriage, births, deaths, etc., entries in a family bible or testament, are admissible even without proof that they have been made by a relative, provided the book is produced from the proper custody. Proof of the handwriting or authorship of the entries is not required where the book is shown to have been the family bible or testament: *Jones v. Jones*, 45 Md., 146.

On a question of legitimacy, a marriage certificate proved to be genuine, and produced by and from the custody

of the mother of the person whose legitimacy is in question, is competent evidence, and strongly corroborative proof of the alleged marriage.

Where the legitimacy of a person is in issue, an acknowledgment of him by his parents' kinsmen as their relation may be given in evidence as evidence of the marriage which must have preceded his birth if lawful: *Gaines v. Green Pond Iron Mining Co.*, 82 N. J. Eq., 86.

Where, on a trial for bigamy, proof of the first marriage by the minister who solemnized the rites, and the marriage license with his certificate thereon, is sufficient proof. It is not a valid objection that the minister was not properly ordained as a minister of the Gospel, according to the rules and regulations of the church: *Taylor v. The State*, 52 Miss., 84.

Hearsay and traditional evidence is competent to prove a marriage when it is the best the nature of the case will admit of. It is not conclusive but may establish, *prima facie*, sufficient for the administration or devolution of property, that there was either a formal marriage, which cannot otherwise be proved, or that the parties agreed *per verba de presenti* to a marriage which was followed by cohabitation: *Chamberlain v. Chamberlain*, 71 N. Y., 423.

When it is sought to establish the fact of marriage by repute, it is essential that such repute should be general and uniform; a divided repute will not suffice for that purpose: *Henderson v. Weis*, 25 Grant's (U.C.) Chy., 69.

The repute, proper to be shown in such case, cannot go beyond the range of the knowledge of the cohabitation; within that range, to contradict the repute of marriage which to be effective must be general, a divided repute may be shown, i.e., that among some friends and acquaintances, the connection was reputed to be illicit, not matrimonial: *Badger v. Badger*, 88 N. Y., 546, reversing 13 N. Y. Weekly Dig., 35, 25 Hun, 230; distinguishing *Clayton v. Wardell* (4 N. Y. 230), *Vincent's Appeal* (60 Penn. St., 228), *Lyle v. Ellwood* (L. R., 19 Eq. 98), 11 Eng. Rep., 702.

Where evidence of cohabitation and reputation is offered to create a presumption of marriage, and the evidence

of reputation is divided, the facts of such cohabitation and reputation are still proper to be taken into consideration by the jury, with the other concomitant circumstances, and if they are satisfied that the marriage is fairly established, under all the evidence in the cause, they are bound to conclude the fact of marriage: *Greenawalt v. McEnelley*, 85 Penn. St. R., 352.

Whenever, upon an issue of bastardy, a question arises concerning the existence of a marriage between the parents of the alleged bastard, direct proof of a marriage in fact, as contradistinguished from one inferrible from circumstances, is not required: *State v. Worthingham*, 23 Minn., 528.

The admissions of a party of the fact of his marriage are against his interest, and when made under circumstances of deliberation are entitled to great weight. Denials, on the contrary, being declarations in his own interest, are entitled to little weight in opposition thereto: *Greenawalt v. McEnelley*, 85 Penn. St. R., 352.

The admissions of parties of the fact of their marriage are in the nature of direct proof, and are competent evidence of the fact: *Greenawalt v. McEnelley*, 85 Penn. St. R., 352.

If a marriage in fact between A. and B., during the lifetime of C., be proved, all mere presumption of a previous marriage of A. with C., founded simply upon habit and repute, is at once overthrown, and it becomes incumbent upon the party alleging such previous marriage to establish it as an actual fact by more direct proof: *Jones v. Jones*, 48 Md., 391.

General reputation of a person being unmarried is not admissible to disprove his marriage: *Bartlett v. Musliner*, 28 Hun, 235; *Badger v. Badger*, 88 N. Y., 546, reversing 13 N. Y. Weekly Dig., 35, 25 Hun, 230.

The oral statement of a husband or wife that they have been divorced, is not sufficient evidence thereof; nor will a separation, however protracted, be sufficient to create the presumption of a divorce: *Wiseman v. Wiseman*, 89 Ind., 479.

Where, on the trial of such an issue, the complaining witness testifies, on her examination in chief, that she was never married to the defendant, it is competent, on cross-examination, to

show a course of conduct on her part, and declarations, inconsistent with her general statement: *State v. Worthingham*, 23 Minn., 528.

The presumption of marriage will not arise from the cohabitation of a man with a woman, if during her life and without any proof of a divorce, he marries another woman: *Jones v. Jones*, 45 Md., 144-6.

A wife is a competent witness to prove a marriage contract between herself and her deceased husband, in a contest where the legality of the marriage is in question: *Greenawalt v. McEnelley*, 85 Penn. St. R., 852.

W., a witness for plaintiff, testified to a conversation between himself and B., at a house where the sister of the latter lived, in which he stated that he had been married, but it wouldn't do to let "the woman" know it. The defendant's counsel asked the witness if he did not have another conversation with B. in the presence of the sister of the latter, in which he stated that "he was not married;" this the witness denied. The sister was thereafter called as a witness for the defence, and was asked as to such conversation. This was objected to generally; the court admitted it to contradict W., "and not as a declaration of deceased." Held, that the evidence was relevant and material, and so a general objection was not tenable; also held, that the defendant was not bound by the answer of W., as the evidence was not collateral but bore upon the issue; and that the sister was a competent witness (Code, § 829), as it was not a personal transaction between her and the deceased: *Badger v. Badger*, 88 N. Y., 546, reversing 18 N. Y. Weekly Dig., 35, 25 Hun, 230; distinguishing *Clayton v. Wardell* (4 N. Y., 230), *Vincent's Appeal* (60 Penn. St. R., 228), *Lyle v. Ellwood* (L. R., 19 Eq., 98), 11 Eng. R., 702.

Plaintiff offered in evidence a letter, the body of which was in the handwriting of the deceased, but signed by plaintiff as "Mrs. Mary Baker," the latter being the assumed name under which they lived together. The letter was written to a nephew of her's, congratulating him on his marriage, and containing such expressions as this: "We wish you much joy." "We expected a visit from you and your wife."

The nephew also testified that B. asked him afterwards if he received the letter. The letter was excluded: Held, error; that it was to be regarded as the joint act of plaintiff and B., and its signature was a representation that she was a married woman; the letter itself was material on that point, and was admissible as part of the *res gestæ*: *Badger v. Badger*, 88 N. Y., 546, reversing 18 N. Y. Weekly Dig., 35, 25 Hun, 230; distinguishing *Clayton v. Wardell* (4 N. Y., 230), *Vincent's Appeal* (60 Penn. St. R., 228), *Lyle v. Ellwood* (L. R., 19 Eq., 98), 11 Eng. R., 702.

Defendants, to meet this presumption, gave evidence to the effect that, after the return of the parties to England, M. in business transactions used the name she bore before her acquaintance with H. M., as a witness, gave explanation as to the reason for using such name in certain of the transactions; as to others she denied such use. Held, that as the facts sworn to by the defendants' witnesses were either contradicted or did not conclusively repel the presumption of marriage, this court was precluded from reviewing the question (Code of Civil Procedure, § 1387), and the finding of the jury was conclusive: *Hynes v. McDermott*, 91 N. Y., 451.

Where, in bigamy, the first wife was known by two names, the question to be considered by the jury is the identity of the woman, and not her name, and it is proper for the court to so instruct the jury. It is the identity, and not the name, that is submitted to the jury. *Taylor v. The State*, 53 Miss., 84.

In the absence of proof it will not, in a civil case, be presumed that the law of marriage of another country is different from that of this State: *Hynes v. McDermott*, 82 N. Y., 141.

On the trial of an indictment for polygamy, it appeared that the defendant, being a Protestant, had been married in Ireland to a Roman Catholic, by a Roman Catholic priest, that he had cohabited there with the woman as his wife, that he had afterwards, while his wife was living, been married to another woman in this commonwealth. Held that the law of Ireland must be proved as a matter of fact; and that in the absence of evidence of what the

law was, the marriage must be considered as legal: *Commonwealth v. Kenney*, 120 Mass., 887.

The weight of authority, however, is that there is a clear distinction between a civil and a criminal case.

On an indictment of Ellis for adultery with Lizzie Rose, it was proved that Lizzie and one John E. Rose, who were citizens of the United States, were married in the State of Maine by a clergyman, who testified that it was part of his duty to solemnize marriages. Ellis was convicted, but on a motion to quash the conviction, it was held that it should have been proved that the marriage was valid under the law of Maine, and the conviction was quashed: *Regina v. Ellis*, 22 New Brunsw., 440, 444 and numerous English cases cited.

In the absence of any evidence, the court cannot presume that a vessel plying across the English channel, on which an American citizen contracted a marriage, was of a nationality which would subject the contract to a law different from our own: *Hynes v. McDermott*, 7 Abb. N. C., 98, affirmed 82 N. Y., 41.

One contesting such a marriage, on the ground of its illegality in the foreign country, must establish affirmatively what the law was there at the time of the marriage: *Hynes v. McDermott*, 7 Abb. N. C., 98, affirmed 82 N. Y., 41.

Testimony of a witness who left the country some years before the marriage—in this case, about eight years—and the production of a Code published subsequently, but some time before the time of the marriage, without anything to show whether changes in the law had not intervened, are not enough to prove what was the law at the time of the marriage.

The Code (Code Civ. Proc., § 942), requires such a book to be shown to contain the existing law: *Hynes v. McDermott*, 7 Abb. N. C., 98, affirmed 91 N. Y., 451.

Every State has the power to enact laws which will bind its citizens or subjects when sojourning in a foreign jurisdiction, provided they in terms profess so to bind them. It is true, such laws have no extra-territorial effect, so as to authorize their enforcement in a foreign country; but upon the return of the parties violating them,

they may be enforced in the same manner and to the same extent as if their infraction had occurred in the State enacting them: *Roth v. Roth*, 104 Ill., 85, affirming 13 Chic. Leg. News, 858.

A marriage contracted in a place where the parties are not subject to a local law in respect to such act, e. g.,—a marriage in an Indian Territory between non-resident whites,—is to be judged by the law of their domicile: *Davis v. Davis*, 1 Abb. N. C., 140.

When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the State, or country, where such marriage took place, and the parents were domiciled, it is thereafter legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit: *Miller v. Miller*, 91 N. Y., 815; distinguishing *Britwhistle v. Vardell* (5 B. & C., 438; 6 Bing. N. C., 885), *S. C.* (2 C. and F., 581; 7 id., 895), *Smith v. Derr's Adms.* (34 Penn. St. R., 126); disapproving *Lingen v. Lingen* (45 Ala., 410).

Plaintiff was born illegitimately in Württemberg, in 1845, where his parents then resided; they removed, with plaintiff, to the State of Pennsylvania, and his father there became a naturalized citizen. In 1853, while domiciled in said State, the parents were married. In 1857 a law was passed by the legislature of that State, legitimizing children, born out of wedlock, of parents who shall thereafter marry, which act, by an act of 1858, was made applicable to all cases arising prior to 1857, save where some interest had become vested. In 1862 plaintiff removed with his parents to this State; his father thereafter became owner of certain real estate, and in 1875 died seised thereof and intestate. In an action of ejectment, held that the provision of the Revised Statutes (1 R. S., 754, § 19) disinheriting illegitimate children did not apply; and that plaintiff was entitled to inherit equally with the children of the deceased born in wedlock: *Miller v. Miller*, 91 N. Y., 815, distinguishing *Britwhistle v. Vardell* (5 B. & C., 438; 6 Bing. N. C., 885) *S. C.* (2 C. and F., 581; 7 id., 895), *Smith v. Derr's Adms.* (34 Penn. St. R., 126), disapproving *Lingen v. Lingen* (45 Ala., 410).

A man and woman whose connection

began in the lifetime of a former wife, who died in 1867, if they desired marriage, lived together as husband and wife, and so held themselves out to the world, at the ratification of the constitution of 1869, were, by art. 12, § 22, thereof united in matrimony, without any new consent or formal ceremony: *Adams v. Adams*, 57 Miss., 267.

Where two slaves contracted in form the relation of husband and wife before emancipation, and were living together at the time of the passage of the act of 1865, they must be regarded as husband and wife: *State v. Whaley*, 10 So. Car., 500.

K., a negro man, and M., a white woman, both domiciled in the county of Augusta, Virginia, left Virginia and went to Washington, D. C., and were married there according to the regular forms for celebrating marriages, and after remaining absent from Virginia about ten days, returned to their home in Augusta county, Virginia, where they have since lived as man and wife. By the laws of Virginia (C. S., 1878, ch. 105, § 1), all marriages between a white person and a negro, are *absolutely void*. On an indictment for lewdly and lasciviously associating and cohabiting together—Held:

1. Although such marriages are not prohibited by the laws of the District of Columbia, and this marriage was performed according to the ceremonies there prescribed, it is *void* under the laws of Virginia, and the parties are liable to the indictment.

2. While the *forms* and *ceremonies* of marriage are governed by the laws of the place where the marriage is celebrated, the *essentials* of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated: *Kinney v. The Commonwealth*, 30 Gratt (Vir.), 858.

Ordinarily when a person, upon a change of domicile, goes into another State or country, the personal *status* which he carries with him will be recognized by the courts of the latter country; but this rule is subject to certain exceptions. If, for instance, such *status* has been acquired by a violation of an express provision of the positive law of the State in which its recogni-

tion is asked, or if it be contrary to the spirit and genius of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well-being of society, or to public morality and decency, in all such cases the *status* will not be recognized by the courts of the latter State: *Roth v. Roth*, 104 Ill., 35, affirming 18 Chic. Leg. News, 353.

A marriage solemnized in this State between subjects of a foreign country domiciled here at the time, in strict conformity with our laws, and between parties competent under our laws to contract the relation, is valid and binding here, notwithstanding such marriage is in violation of the positive law of the country of which they are subjects: *Roth v. Roth*, 104 Ill., 35, affirming 18 Chic. Leg. News, 353.

It is no defence to an action for divorce *a vinculo* where the parties were married in another State, that, by a decree of divorce dissolving a former marriage of plaintiff, he was prohibited from marrying again at the time the marriage was contracted; and this, although it appears that the parties were, at the time of their marriage, residents of this State, and for the purpose of evading its laws went to the other State, returning thither immediately after their marriage, and have since lived in this State.

The marriage, if valid under the laws of the State where it was contracted, is valid here, and every right and privilege growing out of the relation so established attaches to each party thereto: *Thorp v. Thorp*, 90 N. Y., 602, reversing 47 N. Y. Super. Ct. R., 80.

As to whether the general rule of law that a marriage, valid or void by the *lex loci*, is valid or void everywhere, applies to the case of a domiciled citizen of this State, who, while temporarily sojourning in another country, contracts a marriage there, valid under our laws, but invalid by the law of the place, *quære*: *Hynes v. McDermott*, 91 N. Y., 451.

See *Sottomayer v. DeBarros*, 32 Eng. R., 386, reversing S. C., 33 Eng. R., 1.

If competent persons contract a marriage, *per verba de presenti*, in a foreign country, with a view to a future residence in the State of New York, of which one of the contracting parties

is a resident, the presumption is in favor of the validity of the marriage: *Hynes v. McDermott*, 7 Abb. N. C., 98, affirmed 91 N. Y., 451.

A marriage in this State of subjects of a foreign country, valid by our laws, upon the return of the parties to their own country, and their acquiring a new domicile there, may be annulled by the proper courts of such foreign country in accordance with its own laws, for causes not recognized by our laws: *Roth v. Roth*, 104 Ills., 35, affirming 13 Chic. Leg. News, 353.

See *Sottomayer v. De Barros*, 32 Eng. R., 336, reversing S. C., 32 Eng. R., 1.

A subject of the king of Würtemberg, while domiciled in this State, entered into the marriage relation in strict accordance with the laws of this State, but in violation of an ordinance or law of the kingdom of Würtemberg, declaring all such marriages in a foreign State, without the license of the sovereign, absolutely null and void; after the return of the parties to the kingdom, and they had acquired a domicile there, a suit was brought by the husband to annul and declare the marriage void, and the proper court, having jurisdiction by the laws of that country of the subject-matter and of both parties, rendered a decree declaring the marriage absolutely null and void, the effect of which there was not only to establish the nullity of the marriage, but also to annul and terminate the *status* of the parties arising from a *de facto* as well as a *de jure* marriage: Held, that such decree was conclusive upon the late wife in this State, and deprived her of all rights as widow or heir of her former husband: *Roth v. Roth*, 104 Ills., 35, affirming 13 Chic. Leg. News, 353.

A "marriage and inheritance contract" between a husband and wife, after their marriage in the kingdom of Würtemberg, confirmed by the proper court of that country, whereby each was to hold the property belonging to him or her during their joint lives as common property, with the right of survivorship, will not, on the death of the husband, pass the legal title of his real estate in this State to his widow, but such agreement, on his death, operates as an equitable assignment of the estate to the widow, which may be enforced in a court of equity: *Roth v.*

Roth, 104 Ills., 35, affirming 13 Chic. Leg. News, 353.

Where the court of a foreign country has jurisdiction of the parties and subject-matter of the suit, and this affirmative appears, its judgment or decree will be conclusive on the parties, their legal representatives and privies, in all countries where the matters litigated are again drawn in question; and this is particularly so with respect to judgments or decrees affecting the status of a person, they being in the nature of judgments *in rem*, which are binding on the whole world.

The limitation to this rule is, that it may be shown such judgment or decree was obtained by means of fraud, or gross abuse of the process of the court, or flagrant departure from the ordinary course of judicial procedure, as, for instance, that a party in interest sat as a judge in the cause: *Roth v. Roth*, 104 Ills., 35, affirming 13 Chic. Leg. News, 353.

The domicile of a legitimate, unemancipated minor is, if his father be alive, the domicile of the latter, where neither of the parties to a marriage resides here, this court will not take jurisdiction of a suit to annul the contract on the ground that the contract was made here.

An infant, whose parents resided in Canada, filed a bill to annul her marriage, on the ground of her husband's fraud and misrepresentation as to the effect of a Jewish ceremony performed in this State, which she at the time believed to be merely a betrothal. Her husband was domiciled elsewhere. Held, that she was incapable of changing her own domicile, and that, consequently, the court had no jurisdiction: *Blumenthal v. Tannenholz*, 81 N. J. Eq., 194.

In an action of ejectment, wherein plaintiff M. claimed as the widow, and the other plaintiffs as children of H., a citizen of the United States, it appeared that H., who resided in the city of New York, while stopping at a hotel in London, in 1871, made the acquaintance of plaintiff M., an English subject and employe in the hotel. A promise to marry, on his part, and an intention of marriage between them was proved; also a mutual consent to be, and to live together, as husband and wife, and a subsequent cohabitation in that appa-

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rent relation. The evidence, however, established that the cohabitation did not commence with a marriage, valid by the English law, and there was no evidence of a subsequent marriage, in accordance with that law. In June, 1871, the parties went to Paris, where they lived together as husband and wife, and he introduced her to acquaintances as his wife. They returned to London, where they lived together until his death which occurred in 1874, and where the children, who are plaintiffs, were born. H. addressed M. as Mrs. H., and so addressed letters to her, and their life in England was the ordinary household life of persons lawfully married. Held, that while the evidence was insufficient to show, or to raise a presumption of a marriage in accordance with the requirements of the English law, in the absence of proof as to the marriage law of France it might be assumed that the requisites to constitute a marriage in that country are the same as our own, and so that the mutual assent of the parties to assume the relation of husband and wife, followed by cohabitation, constitutes marriage; and that the evidence raised a presumption and authorized a finding that the parties interchanged matrimonial consents in France: *Hynes v. McDermott*, 91 N. Y., 461.

Two domiciled British subjects residing in Paris, in contemplation of a marriage to be solemnized between them, both according to the forms of the Church of England and according to the forms required by the French law, executed a marriage contract in the French form and in the French language, whereby, after reciting that the marriage was intended immediately to take place "according to law," it was agreed that the parties should have the enjoyment in common of all property according to the "custom of Paris," which should regulate their future community, and the other clauses of the contract, even in the event of their taking up their residence in foreign parts, or of their acquiring property in countries where different laws, uses, and customs prevailed, which they thereby expressly renounced and disclaimed, that M. L. E., the intended husband, should be chargeable to L. C. S., the intended wife, for her marriage portion when received; that out

of the marriage portions of each a certain specified sum should enter into community, and that the surplus should remain excluded from such community, and belong to each of them respectively, as their separate property.

The marriage was solemnized according to the forms of the Church of England in the ambassador's chapel at Paris, but was never solemnized according to the forms of the French law; in fact, differences arose between the parties, and they never cohabited as husband and wife.

By the "custom of Paris," which was afterwards embodied in the *Code Napoleon*, a wife had power, without any consent of her husband, to dispose by will of all her property not brought into community.

L. C. S. duly made her will according to the English law, but not according to the forms required by the French law, and bequeathed all her property to E., and appointed him executor.

In a suit by E., against M. L. E., and against the trustees of the estates of the father of L. C. S., for payment of a legacy bequeathed to L. C. S. before the date of the contract, and charged upon estates in England,—Held, that the marriage was a valid English marriage, and the contract a valid English contract, so far as regarded English property. That by the terms of the contract the rights of the parties were to be regulated by French law. That by that law a wife, under such a contract, if valid in France, being entitled to dispose by will of all her property not brought into community, the will of the wife executed according to English law, and so far as regarded English property, was good, and the plaintiff, as her executor, was therefore entitled to the legacy in question: *Este v. Smyth*, 3 Eq. R., 1208.

As to what law governs the marriage in one country of subjects of another country, and the law of marriage of citizens of the United States abroad, see U. S. Revised Statutes, § 4062; *Bar's International L.*, tit. Marriage; 1 *Bish. Marriage and Divorce*, §§ 348-461; 2 *id.*, §§ 116-214; *Burge's Col. Law*, tit. Marriage; *Dacey's Law of Domicile*, tit. Mar.; 1 *Halleck's Int. L.* (*Baker's Eng. ed.*), 162-4, 326, 369, 387; *Phillimore's Int. L.*, tit. Mar.; *Pigott's For-*

eign Judgment, tit. Divorce; *Id.*, tit. Marriage; Savigny's Priv. Int. L., tit. Mar.; Schouler's Husband and Wife, titles Conflict Laws, Divorce, Marriage; Story's Conf. of Laws, titles Divorce, Marriage; Westlake's Priv. Inter. L., titles Divorce, Domicile, Judgments, Foreign Marriage; Wharton's Conf. of Laws, titles Divorce, Domicile, Foreign Judgments, Marriage; Wheat. Int. L., titles Conflict Laws, Divorce, Domicile, Jurisdiction, Marriage; Woolsey's Int. Law, tits. Divorce, Domicile, Marriage, Private International Law; Stewart, Marriage and Div., §§ 108, *et seq.*; Whart. Com. on American Law, §§ 275, *et seq.*; 7 Vir. L. J., 641; 18 Amer. Law Rev., 24; 21 Amer. L. Reg. (N.S.), 22; *Id.*, 595; 20 Amer. L. Reg. (N.S.), 55; 17 Amer. L. Rev., 166; 12 Cent. L. J., 510; Davis v. Davis, 1 Abb. N. C., 149; Harrall v. Wallie, 29 Alb. L. J., 171, 87 N. J. Eq., 458, and Mr. Stewart's note; Kent v. Burgess, 11 Sim., 361; Sottomayer v. DeBarros, 32 Eng. Rep., 336, reversing S. C., 32 Eng. Rep., 1; Regina v. Ellis, 23 New Bransw., 444, and cases cited.

Where a judgment of divorce was obtained from one in this State by his wife, on the ground of his adultery, which forbade his marrying again during the lifetime of his wife, and he went to Michigan and again married, held, such marriage was legal. That the penal portion of the judgment had no effect out of the State: *People v. Chase*, 28 Hun, 810; *Sottomayer v. DeBarros*, 32 Eng. R., 336, reversing 32 Eng. R., 1.

The wife of M., a resident of this State, procured a divorce from him on account of his adultery; the judgment forbade him from marrying again. He thereafter went into the State of New Jersey, and there married during the life of his first wife, returning with his second wife to this State, and continuing to reside here. The statute law of New Jersey declares that "all marriages, where either of the parties

shall have a former husband or wife living at the time of such marriage, shall be invalid, * * * and the issue thereof shall be illegitimate." In an action to test the right of plaintiff, a son born of the second marriage, to inherit, as the lawful heir of M., held, that at the time of the second marriage the latter had no former wife living within the meaning of said statute; that the laws of this State and the provision of the judgment prohibiting marriage had no effect, and M. had a right to marry in another State whose laws did not prohibit a second marriage by one divorced; and that plaintiff was legitimate, and so entitled to inherit.

Also held, that as there were statutory provisions on the subject, there was no presumption that the rule of the common law still existed in New Jersey; that the statute superseded and took the place of such rule.

The distinction between the New Jersey statutes upon this subject and those of this State pointed out: *Moore v. Hegeman*, 93 N. Y., 531, affirming 27 Hun, 68; distinguishing 11 N. Y., 284.

After the dissolution of the first marriage, M. and his first wife were again married, but in an action brought by her it was adjudged that the second marriage was prohibited by the statutes of this State, and was void; after the entry of this judgment the marriage in New Jersey took place. It was urged here that such re-marriage was valid. Held, that the judgment not having been reversed, and having been made by a competent court having jurisdiction of the parties and the subject-matter, was conclusive.

As to whether, after a judgment of divorce on the ground of the adultery of one of the parties, and the consequent prohibition against another marriage by the guilty party, a second marriage of the parties in this State will be valid, *quære*: *Moore v. Hegeman*, 93 N. Y., 221, affirming 27 Hun, 68.

[6 Appeal Cases, 560.]

H.L. (Sc.), June 23, 1881.

[HOUSE OF LORDS.]

560] *HISLOP, Appellant; LECKIE and Others, Respondents.*Feu Charter—Similar restrictive Conditions appearing in Feu Charters from Common Superior—What necessary to give each Feuar a Title to enforce them.*

It is settled by a series of decisions in the law of Scotland that where it appears that the restrictions in a feu contract are entered into for the benefit of other feus, either already existing, or to be created by the superior thereafter, the restrictions may be enforced by each co-feuar as far as his interest is concerned. But the fact of several feuars of neighboring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality and community of rights and obligations is otherwise established between them, which can only be done by express stipulations in their respective contracts with the superior, or by reasonable implication from reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves.

A.'s author was a party to a feu contract of a piece of land upon which a house was already built, and he was taken bound not to build any other buildings on the said piece of land except offices. The adjoining pieces of land were feud off, some being taken not to build and others having that right. It was not indicated in A.'s feu that the restrictions were imposed for the benefit of the co-feuars, beyond the facts that the feus were all given out nearly at the same time; that some of the conditions inserted in the feus are similar to each other; and that the houses being built in a square, produce a considerable degree of uniformity.

B. and C., proprietors of a neighboring feu, sought to prevent A. building a carriage show room on the ground intervening between his house and the street of the square, and raised an interdict with the "consent and concurrence" of the superior; there was no condescendence or pleas in law for the superior:

Held, reversing the decision of the court below, (1) that the restrictive conditions as to building in A.'s feu contract was not in any sense *jus quasitum tertio*; and (2), that the superior was not a party complainant in the action for his own separate interest; and therefore B. and C. being strangers to A.'s contract, A. ought to have been assolvizied from the action.

Persons who have no title in their own persons to raise and insist in an action, 561] cannot have the right to sue, where nil, validated by the consent *and concurrence of the party to whom alone such right or title of action belong.

B. and C., owners of an adjoining feu, raised an action with "consent and concurrence" of the common superior to enforce building restrictions contained in A.'s feu contract:

Held, that B. and C. were strangers to the action, and therefore had no title to sue.

See remarks of Lord Watson as to the question of the importation of new parties into the suit under the Court of Session Act, 1865 (31 & 32 Vict., c. 100).

[6 Appeal Cases, 588.]

H.L. (Sc.), July 27, 1881.

[HOUSE OF LORDS.]

***M'BAIN, Appellant; WALLACE & Co., Respondents (').** [588]

Contract to purchase—Article in Course of Completion—Unfinished Ship—Bankruptcy—Security—Delivery of Article before Sequestration—Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), s. 1.

By the law of Scotland there must be delivery to give effect to a contract of sale, but the Mercantile Law Amendment (Scotland) Act for the express purpose of assimilating the Law of Scotland to that of England on such points, enacts: "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same."

B. & C., by verbal communing, agreed to make advances to A. on the security of a ship he had nearly completed building on his own account, provided A. entered into an absolute contract of sale of the vessel. An unqualified contract of sale was completed by which A. agreed to complete and deliver to B. & C. the vessel, for a price to be paid in two instalments, with power to B. & C., in the event of A. failing to complete the contract, to enter into possession of the vessel and complete it, or sell it.

In a correspondence between A. and B. & C. and a shipbroker and others subsequent to the contract, and for the purpose of getting a purchaser for the vessel, the ship was called A.'s ship; but no letters were written to any persons who were induced by their means to deal with the ship upon the footing of its being the property of A.

From the date of the contract B. & C. gave, by checks at various dates, advances to A., taking a receipt on account of the purchase of the ship; at the same time bills for like amounts were accepted by A. The advances equalled the full price of the ship. Before it was completed or delivered A.'s estate was sequestrated. The bills accepted by A. were paid by B. & C. In a question between A.'s trustee and B. & C.:

Held, (1) affirming the decision of the court below, that there was here a *bona fide* sale in fact and intent unaccompanied by delivery, and—whether security was the object or not—every condition of the statute was fulfilled; (2) that no reputation of ownership had been created in the seller A. Therefore B. & C. had a right to the ship.

Held, where there is an absolute *bona fide* contract of sale of an article, which is not delivered before the bankruptcy of the seller, the right of the *buyer [589] under the contract to have delivery cannot be defeated by proof that the character of buyer had been conferred on him merely for the purpose of his having a security for money intended to be advanced by him.

APPEAL from a judgment of the Court of Session.

In 1875 James Roney commenced business as a ship-builder in Arbroath. Towards the end of that year he commenced to build as a speculation on his own account a three-masted schooner of about 927 tons burden. This vessel he entered on his books as No. 2, and for the purposes of survey she was also entered at Lloyd's. Towards the end of 1877 her hull, with all her internal arrangements, were all

(¹) Affirming Court Session Cases, 4th Series, vol. 8, p. 360.

but completed and ready for launching. From that time down to the present she has remained in that state, with the exception of having received coppering and a false keel. In building the vessel No. 2 and three others to order Roney, by August, 1877, had incurred considerable liabilities. In particular he had then obtained and discounted an accommodation bill for £500 from John Wallace & Co., the respondents, iron merchants, Dundee; and he had also incurred liabilities to that firm to the amount of £300 for goods. Roney being unable to meet the obligations contracted by him, after verbal communings with the respondents, signed a contract, dated the 17th and 25th of January, 1878, for the completion and sale by him, and the purchase by them, of the vessel No. 2 in consideration of the sum of £2,500, &c.

The important clauses of this contract are as follows :

(3.) It is hereby agreed and declared, that when any sum shall be paid or appropriated by the second parties towards payment of the said price, the said vessel in her present unfinished state, and at the stage of her build at which she has reached, as shown by the said specification, and all materials and articles of wood or iron or other metals of every description, furnished or unfurnished, and whether made up or not, but intended or destined to be used in the construction, fitting-up, and completion of the said vessel, and her appurtenances, which shall be lying or situated in or about the vessel, where she is building, or elsewhere in or near the shipbuilding yard or other premises occupied by the first party at Arbroath, shall thereupon *ipso facto*, to all intents and purposes, become and remain the property of the second parties, although they may be used by the first party as materials for the completion of the vessel or of her appurtenances, and it is further and in like manner agreed, that all subsequent additions made to the vessel and her appurtenances as the work proceeds, and all additional materials and articles of any description that shall be brought to or belong, or be situated as aforesaid, intended or destined to 590] be used in the construction, fitting up, and *completion of the vessel or her appurtenances, shall *ipso facto* of such intentioned destination or situation become and remain the property of the second parties, although, without prejudice to such right of property they may be used by the first party as materials for completion of the vessel or her appurtenances as before mentioned; and generally it is hereby agreed that the said vessel and her appurtenances, or any part thereof, or materials or articles intended or destined for

the completion of the same as aforesaid, shall not be or become liable to any debts, contracts, or engagements of the first party, or be otherwise affected by or attachable for his acts or deeds, or be at his order and disposition, but shall, subject to the uses foresaid, be and remain the absolute property of the second parties: Declaring that the instalment of price applicable to the present stage of the vessel's build is agreed to be two thousand pounds sterling, and that the final instalment of price payable for the vessel and her appurtenances on complete fulfilment of this contract and said specification, is five hundred pounds sterling, making together the foresaid price of two thousand five hundred pounds sterling, which respective instalments shall be payable on the completion of the said vessel and its appurtenances, to the second parties' satisfaction, and after the vessel has been launched by the first party, and full legal possession thereof received by the second parties But it is hereby agreed that if the second parties shall elect to pay, or appropriate any sum or sums for settlement of any part of the foresaid instalments sooner than the date fixed for payment thereof, then and in that event the sum or sums that may be so paid or appropriated shall bear interest from the date of advance or settlement at the rate of five pounds per centum, and the advance or advances and interest thereon shall be deducted from the foresaid price at final settlement.

(5.) The first party agrees and binds himself to launch and deliver the said vessel and her whole appurtenances completed as aforesaid, with the certificates and other necessary documents before mentioned, within three calendar months from the date or last date hereof; and he further agrees and binds himself, at his own expense, to insure the vessel and appurtenances, &c.

(6.) In case the first party shall suspend the work on the vessel or her appurtenances, unless compelled to do so from the effects of fire or bad weather, or strike of workmen, to such an extent as to cause a suspension of work, or if he shall refuse or fail to carry out and complete this contract, and said relative specification as hereinbefore agreed to, then and in any such case it shall be lawful for the second parties, by themselves or others employed by them, and without any judicial warrant, unless they may consider such expedient, but only after a previous notice to the first party of fourteen days by letter, . . . to enter into and upon the first party's shipbuilding yard and premises at Arbroath, and take and retain possession thereof, and of the whole materials and

articles intended and destined to be used for the purposes of this contract and said specification, and thereafter to sell the said vessel and her appurtenances, and the materials and articles before referred to, or any part thereof, in the condition in which they may then be, at valuations to be put thereon by the arbiter after mentioned; and failing such valuation, then by public sale, on such terms as the second parties may think proper, and to receive and discharge the prices thereof, and apply the free proceeds, after deduction of all costs and charges, towards repayment of any instalment or portion of any instalment of the price that may have been 591] advanced *or appropriated by the second parties as before mentioned, and any other payments or outlays that they may have made or incurred in the premises, with interest thereon from the date of advance, at the rate foresaid. And after full payment and satisfaction to the second parties in the premises, and relief and reimbursement to them of all obligations, payments, and charges of every kind, which they may have contracted or incurred in relation to this contract and the consequents thereof, and any other debts or obligations due and owing by the first party to the second parties, on any other ground whatever, relating thereto or not, any free balance shall be paid to the first party; or the second parties may, if they see fit, instead of selling the vessel and her appurtenances, and the said materials and articles, or any part thereof as above mentioned, complete the vessel and her appurtenances, in terms of the present contract and said relative specification, and for these purposes employ all necessary workmen, and use all the machinery, working tools, implements, stock, and material of every kind necessary for such purposes, in and about or near the said premises of the first party situated at Arbroath; and in case the second parties shall expend any sums in so completing the vessel and her appurtenances, over and above the said contract price, the same, with all costs and outlays incurred by them, shall be recoverable by them from said first party.

On the 24th of April, 1880, the estates of James Roney were sequestrated, and the appellant, James M. M'Bain, banker in Arbroath, was elected trustee thereon.

Four days after the sequestration the respondents gave notice that on the 17th of May, 1880, in terms in particular of clause 6 of the contract, they would enter Mr. Roney's shipbuilding yard at Arbroath, and take and retain possession thereof, and of the whole materials and articles intended and destined to be used for the purpose of the said contract;

and thereafter either to sell the vessel and her appurtenances, and the materials or articles referred to, or complete the vessel and her appurtenances, in terms of the said contract and specification.

The appellant thereupon raised this action by a process of suspension and interdict, praying to have the respondents interdicted from entering upon and taking possession of Roney's shipbuilding yard and articles therein, and from selling or completing the said vessel and her appurtenances.

The appellant averred :

(Stat. 6.) The price of the vessel was under the contract stipulated to be paid on the completion of the ship, which, by article fifth of the contract, was to be within three months from the last date thereof. The vessel, however, was not finished within the three months, and is not even now completed, she being still on the stocks. No part of the pretended price of the said vessel has been paid ; *but [592 the respondents who had already made advances to Roney of £800, continued from time to time to make advances to him, for which they afterwards drew on him, and discounted at the Royal Bank in Dundee, his acceptances. The respondents charged interest and commission on the same, the reality of the matter thus being simply that, in respect of certain sums of commission, the respondents lent their names to Roney, who obtained the proceeds arising from the discounting of his own acceptances, &c.

(Stat. 12.) The intention of the parties in entering into the foresaid contract was, that it should be simply as a security for the debt already due by Mr. Roney to the respondents, and for the accommodation bills to which they were to become parties for his behoof. And accordingly, after the contract was entered into, Mr. Roney was left by the respondents in the uncontrolled possession, management, and ownership of the schooner. They got and took no possession, symbolical or otherwise, and in no shape interfered with Mr. Roney with reference to the ship. The contract has all along been kept latent, and has not been published or made known to any one. From time to time Mr. Roney corresponded with various parties with a view to a sale of the vessel. He advertised her in his name, and at his own expense, to be disposed of. He was under no restraint, verbal or otherwise, from selling the ship, so far as the respondents were concerned. He met them very frequently when in Dundee, and communicated to them his prospects of selling the vessel, and they never sought to control him as to the amount of the price he asked for the ship, nor even

indicated that they had any right or interest in her, other than a right in security for the accommodation transactions above mentioned. On the contrary they corresponded with him on the footing that the vessel was his vessel, and in their correspondence they asked him the lowest price at which he would sell her. The ship was not finished within the three months prescribed by the contract, and the respondents in no shape urged Mr. Roney to finish her within that time, nor did they at the end of the three months, or at any other time during the period of two years and four months which has elapsed since the date of the contract, give any intimation to him of the consequence of his non-completion of the vessel, and not until the notice had they ever attempted to make an absolute claim to the ship.

His material pleas in law were :

(1.) The vessel and others not having been sold to the respondents, and no price having been paid for the same, the respondents are not entitled to take possession of them. (2.) There having been no delivery to the respondents of the vessel and others in question, interdict should be granted as prayed for. (3.) The transaction between the respondents and the bankrupt being one by way of security only, and this fact being instructed *in gremio* of the contract, the respondents are not entitled, as in a question with the trustee on the bankrupt's sequestrated estate, to insist on delivery of the vessel and others, and for that purpose to take at their own hand possession of the bankrupt's shipbuilding yard, stock, and plant, as intimated by them.

The material portions of the respondents' answers were as follows :

(Ans. 6.) Denied that no part of the price had been paid. 593] On the contrary, *sums in all amounting to £2,550 were received by Roney to account of the price of the vessel, conform to checks in his favor granted by them, and relative receipts granted by him.

(Ans. 12.) Denied that the contract was intended to be only in security, or that there were any accommodation bills for Roney's behoof. When the contract is fulfilled, the respondents will have no further claim against the bankrupt or his estate beyond the sum of £227 or thereby, due to them for furnishings, and unconnected with the price of the vessel. Admitted that the vessel not being finished or ready for launching, remained on the stocks in the shipbuilder's yard, but denied that the contract was kept latent, and that possession was not taken by the respondents. It was well known

in both Arbroath and Dundee, amongst bankers, insurance companies, and men of business generally, that the vessel had been acquired by the respondents. Further, that when Roney was endeavoring to find a purchaser, it was at their request, and in doing so he was acting solely for their behoof.

Their pleas in law were, *inter alia* :

(2.) The contract being a contract of sale and reduced to writing, the allegation that it was truly a security cannot be proved otherwise than by writing. (3.) When a ship is purchased on the stocks on the terms that it shall be finished and launched by the builder, and paid for by instalments, the property of the materials as they are put together, at all events after payment of the first instalment, belong to the purchaser, and not to the trustee in the builder's bankruptcy. (4.) The right of a trustee in a sequestration being *tantum et tale* as it stood in the person of the bankrupt, and the respondents having bought the vessel and paid the stipulated price, they are entitled to delivery and possession in terms of the contract. (5.) Assuming that the transaction amounted to a security only, the transfer being *ex facie* absolute, the complainer is not entitled to possession, except on payment of the sums received and due by the bankrupt to the respondents.

Roney being examined in the proof allowed stated, *inter alia* :

When I found myself in difficulties in the beginning of 1877, I asked Mr. Stewart, one of the partners of the respondents' firm, if he could advance any money, and he gave me an accommodation bill for £500. I was the acceptor on the bill. My liabilities went on increasing during the year 1877. I had a trade account with the respondents at this time. In September, 1877, it amounted to £600 odd, and I paid £300 odd, and granted a bill for £300. I was thus indebted to the respondents upon bills to the amount of £800. When these bills fell due I was unable to meet them. About the end of the year 1877 I met Mr. Wallace and Mr. Stewart in their office in Dundee, with the view of getting the bills renewed (those for £500 and £300). They demurred to renewing the bills, unless I could give them some security. They asked how I stood about my affairs? I explained how I was hampered with this vessel on the stocks,—that I could not get her sold, that I could not get any money on her, and that if I had her sold I would be able to meet the bills. After

some talk I offered to give them the vessel if they could raise any money on her in security for the bills,—to allow them to lie over till I got the vessel sold. Mr. Wallace, I 594] *think, suggested they should consult Mr. Thomson about it. I came back next day, or the day after, and Mr. Stewart and I called upon Mr. Thomson, solicitor, Dundee. It appeared that Mr. Wallace had been there before us, because Mr. Thomson knew what we had called for. He explained that the respondents could not take a mortgage on the vessel unless she was launched and registered, and that the only way would be a sale. I understood that this was the only way in which they could take the vessel as security. It was then arranged that the bill of sale, or whatever it is, should be made out in that way, and that they should advance the money as I required it in the future on the vessel. There was no price agreed on. The reason why £2,500 was put in was that Mr. Stewart asked me in the office if £2,500 would put me over my difficulties till I got the vessel sold, and I said, "Plenty; perhaps I would not require it all if I got her sold soon." I agreed to grant the security in the form of an absolute conveyance. In the first arrangement the £2,500 was put in for the vessel without an outfit—that is, just the hull and spars—but when the contract was made out it embraced the whole outfit, to make the vessel ready for sea. I was never even consulted about that. Mr. Thomson prepared the conveyance, and Mr. Stewart and I signed it in Mr. Thomson's office on the 17th of January, 1878. . . . £2,500 was mentioned for the vessel finished. She would be worth close upon £4,000 at that time. I would not have sold her for anything like £2,500 then. I got £2,950 for her subsequently, and vessels had very much depreciated in value during the interval. After signing the contract in January, 1878, I got an advance of £400 from the respondents, and I granted a bill for £600. The £500 bill was renewed, and the £300 bill was renewed to the extent of £180, the remaining £120 being allowed to lie over. I got various advances from the respondents during the years 1877–78, for which I granted receipts. The mode in which those advances were made was by bill drawn by the respondents, accepted by me, and discounted by them. I generally got a check from them, but not always, for the full amount of the bill drawn. When I got those checks I granted receipts in the terms of No. 74. On one occasion they got a receipt for £120, when no money passed at all. It was the balance of a bill for £300. They asked for a receipt for that sum as if they had paid it to me, which they

had not done. The form of receipt was written out by Mr. Thomson on the day the contract was signed, and it was adhered to right through. I agreed to grant receipts in those terms without any remonstrance. I asked a back-letter from Mr. Stewart a week or two afterwards. I demurred to granting receipts and accepting bills at the same time. I thought they were having too much security over the vessel. I said to Mr. Stewart it was all well enough as between him and me, but something might happen to either of us, and then they could claim the vessel. "Oh," he said, "never mind that; the heavens might fall," and he did not give me the back-letter. . . . The amount for which I have given receipts is £2,550. . . .

Mr. David Stewart said:

I am a partner of the respondents' firm. All the transactions between our firm and Roney were carried on through me. In the end of 1877 there were bills current due by Roney to the amount of £845 8s., £500 being for cash lent, and £345 8s. for goods. He called at my office in November, 1877, and told me he had been at Mr. Hutton's, and that Mr. Hutton had declined to give him assistance. *He [595 said that no banker would advance money on the security of a ship on the stocks. I suggested that he should apply to Mr. Mackenzie, the agent of the Royal Bank at Dundee. I accompanied him to Mr. Mackenzie. Mr. Mackenzie would not accept the security. He said that nobody would advance money on the security of a ship on the stocks, unless against a buying contract. Some weeks afterwards Roney again called at my office. He then wished to get his ship sold. He had been trying before that to get her sold. I suggested that he should see Mr. Charles Robertson, who manages a number of ships in which I am interested. I called upon Mr. Robertson with him twice, but we were not able to induce Mr. Robertson to buy. Roney came back to me early in January, 1878, and asked whether we could not buy the ship ourselves. I said we had quite enough of shipping, unless we could get a bargain of it. I said I would consult my partner, Mr. Wallace, who lives in London. Roney on this occasion suggested a price, £2,500. I understood that was to include the completion of the vessel, and to make her ready for sea. Mr. Wallace came down to Dundee and saw Roney. At the meeting which took place, Mr. Wallace spoke about buying the vessel at the price named by Roney, but said he would go to Mr. Thomson and see if he could prepare a proper buying contract that would

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keep us secure for what we were to pay for the vessel until she was launched. The reason why he desired to see Mr. Thomson was that the vessel was then on the stocks unfinished. . . . On the 18th of January, Roney and I called at Mr. Thomson's office. The contract was read over by Mr. Thomson's clerk, and Roney heard it read. We there and then signed it, and it was sent to London for Mr. Wallace's signature. On our return to my office that day, Mr. Roney said—"Now, suppose you were to sell this ship for more than £2,500, what is my position to be?" I said, "You have signed a contract for sale." "But," said he, "suppose you were to make a big profit," and he wanted a back-letter. I said, "There will be no back-letter. There is no understanding or misunderstanding upon the subject with me, and neither let there be with you. It is an out-an-out contract of sale, and any agreement, verbal, implied, or written, may vitiate the contract." I throughout held this contract to be an out-an-out absolute sale. Roney never again asked me for any back-letter or qualification. I paid him £400 after the contract was signed, and obtained a receipt. For every check I gave him there is a receipt, but there is one receipt for which there is no check—viz., £120. We had retired a bill of his for £120, and we accordingly sent a receipt to him to be signed, because in fact we were paying cash on his account. We have paid altogether £2,550 to account of the price of the ship, or £50 more than was stipulated. There was to be some extra work done, Roney said, and he very much wanted the £50. The bills drawn upon Roney after the date of the contract had no connection with the cash that passed at all. The object of getting those bills, I told Roney, was, that we required to be kept in our cash advances till we had resold the vessel. We were not bound to pay till the vessel was launched. Roney agreed to that. He never incurred any liability whatever in connection with those bills. We have paid every one of them. There is no charge in our books against him in connection with discount or anything else. The bills were drawn, it might be, up to the amount of the advances, or it might be something different; no attention was paid to that at the time. In our books the full amount is put to his credit, and the cash to his debit. . . . Some months after 596] *the date of the contract, I spoke to Roney about the number of ships that we had and told him they were not paying, and I asked him to take steps for selling the ship in question. He promised to do so, and he told me that he had advertised in the Shipping Gazette. This was some time in

1878. He and we both made efforts to sell, but without effect. The policy of insurance on the vessel was transferred to our name immediately after the contract was signed. Nothing ever passed between me and Roney, authorizing him to treat the vessel as his property, either on her completion or on getting her sold. . . . When Roney asked for the back-letter he seemed to have a floating idea in his mind that the ship had been parted with as security. I suspect I must have known what he meant when he asked for the back-letter. He seemed to think that the transaction, though in shape a transaction of sale, was in reality a security. I at once refused to give a back-letter, assigning as a reason that it might vitiate the contract. Q. Why were you afraid of the contract being vitiated?—A. Because we wanted to be absolutely safe, and have the contract to express actually what it was. Q. Were you afraid that if you granted the back-letter it might be found out that the contract was one of security only?—A. A back-letter might have indicated that. Q. And you were afraid of that?—A. Well, I was just wanting to go upon the contract, and there was no occasion for him asking a back-letter. My explanation of the words I used is this, that if we had parted with the money without a proper buying contract, we might have been held as taking security, and there was no occasion for a back-letter, seeing a proper buying contract had been signed by both parties. Had this vessel been sold for more than what paid our debt, I would have considered myself morally but not legally bound to account to Roney for the access, because he had been in business for a while and lost a lot of money, and we did not want to make a profit of his necessities. I was willing to give him a share of the profit. I don't know whether he understood that too; but that is what I would have done, though only from moral obligation. Q. Was that not what you understood at the time was to be done?—A. It was never so expressed. [Question repeated.] A. There was no understanding. Q. Was it not really in your mind at the time that that was to be the result of the transaction?—A. I suppose may be it was; at the same time we must keep ourselves legally right whatever our moral obligation may be. The money was not to be paid till the ship was launched, but it was perfectly understood that Roney was to get money from us as his necessities required. We were not to hurry him with the completion of the ship. He was to take his own time to it; it was a sort of stock job for him.

The following letters, with others, were produced :

Wallace & Co. to James Roney.—4 May, 1878.—Dear Sir, —Please send full particulars of the three-masted schooner to Mr. David Mackenzie, shipbroker, London. For Anderson of London has just lost one. Mackenzie is employed trying to get one to replace. Let the particulars be as full as possible ; size of hatchways, whether beams in hold, and lowest price, &c.

Wallace & Co. to Messrs. Broadwood, Jones & Co., Leadenhall Street, London.—1 Sept., 1879.—Kindly keep Mr. Roney's ship which he has for sale in mind, we are interested in this vessel, and are very anxious to have it sold at even a cheap price.

597] **Messrs. Broadwood, Jones & Co. to Wallace & Co.*—6 Sept., 1879.—Referring to yours of 1st inst. respecting Mr. Roney's ship, we find that he is asking £3,600 for her. This is a very high price.

Wallace & Co. to James Roney.—6 Sept., 1879.—Inclosed is letter for Broadwood, Jones & Co. Is £3,600 the very lowest at which you would be disposed to sell ? Please say for our guidance.

James Roney to Wallace & Co.—8 Sept.—I have yours of date, with inclosure from Messrs. Broadwood, Jones & Co., but I do not think the price asked is too much for the ship : it is rather over £12 per ton ; but as I am anxious to sell I would take £3,500 for her. Could they not get their friends to inspect the ship, and then give an offer if they think £3,600 too high a figure. If it was anything like the thing I would accept it to get clear of her although it was lower than £3,500.

Wallace & Co. to Broadwood, Jones & Co.—11 Sept., 1879.—We are favored with yours of yesterday *re* Roney's ship. We know you will do your best in this matter. We have a personal interest in it, as we are under considerable advances to Mr. Roney against this vessel, and we want to realize and he wants to retire from shipbuilding ; so if your correspondents are *bona fide* inquirers, kindly do what you can to hurry them on judiciously.

There was also produced receipts for the sums amounting in all to £2,550, paid by Wallace & Co. to Roney. They were worded as follows :

Received by me from Messrs. John Wallace & Co., iron merchants, Dundee, the sum of to account of the purchase price payable by them for the three-masted schooner

No. 2, presently building by me for them in my yard at Arbroath, under contract between me and them.

Shortly after the date of the letter of the 11th of September, 1879, Roney did succeed in selling the vessel to Messrs. Thorn & Cameron of Glasgow, at the price of £2,950. Owing to Roney's difficulties, which in a few weeks resulted in his sequestration, he was unable to complete his bargain, and Messrs. Thorn & Cameron on the 21st of April, 1880, rescinded the contract.

The Lord Ordinary (') decided in favor of the appellant, and by interlocutor dated the 23d of November, 1880, granted the interdict as craved. But the Lords of the Second Division, 7th of January, 1881, recalled the interlocutor of the Lord Ordinary, and repelled the reasons of suspension (').

On appeal,

July 26, 27. *The Solicitor-General for Scotland* (Mr. J. B. *Balfour, Q.C.), and Mr. *Benjamin*, Q.C., con- [598
tended for the appellant that the whole actings and transactions showed this was merely an attempt to constitute a security arrangement, and not a true sale. If a purchase the cross-transaction of bills for cash would not have been carried out, nor would the vessel have been left in Roney's complete control. At the most there was here a sale with a simultaneous agreement with the written contract that it should be a security. But whether the transaction was a contract of sale or one merely of security, not having been followed by delivery, it was not effectual to transfer the property, for by the law of Scotland, which differed from the law of England, the property of the thing sold remains with the seller till delivery, though the price should be paid: *Stair*, Inst. 1, 14, 2; *Ersk.* Inst. 3, 3, 2; 1 *Bell's Comm.* (7th ed.), pp. 171, 181; *Salter v. Knox* ('); *Mathison v. Alison* ('); *McArthur v. Brown* ('); see as to securities over moveables, 1 *Bell's Comm.* (7th ed.), p. 273; *Boigs v. Watson* ('); *Anderson v. McCall* (').

The respondents relied on *Simpson v. Duncanson's Creditors* (') *but there the payment was to be by instal- [599

(') Lord Rutherford Clark.

(') Court of Sess. Cases, 4th Series, vol. viii, p. 860.

(') Mor., 14,202.

(') Court of Sess. Cases, 2d Series, vol. xvii, p. 274.

(') Court of Sess. Cases, 2d Series, vol. xx, p. 1232.

(') Mor., 11,587.

(') Court of Sess. Cases, 3d Series, vol. iv, p. 765.

(') The report, as reported by Lord Monboddo in Morison, August 2, 1786, 14,204, is as follows:

Simpson employed Duncanson to build a ship for him.

The materials composing the hull were to be provided by the builder; but the

ments as the ship attained certain specific stages of building, and that case was decided not so much upon general principles as upon the particular terms of the contract: see also opinion there of Lord Justice Clerk M'Queen.

The Mercantile Law Amendment (Scotland) Act, sect. 1, did not apply, (1.) because there was, in reality, no contract of sale; (2.) that section only applied to a real sale of a specific article ready for delivery and completed; and (3.) it did not apply where the goods are left in the seller's custody at his order and disposition. And none of the judges in the court below put any weight upon the statute. In *Sim v. Grant* (1) it was held that this section did not apply to a transaction or sale, under which the subject sold (a horse) remained undelivered, and the seller not only had the custody, but continued in use and possession of it, with power to sell: see also *Edmond v. Mowat* (2). Those cases applied here, where Roney, the seller, beyond question had been left with more than the naked custody; and with the power

employer was to furnish the masts and other articles necessary for completing the vessel, and the price was to be paid in three different portions, one at laying the keel; another, when the vessel was built up and planked to the top of the gunwale; and the remaining sums when the ship was launched.

After receiving payment of the first portion, Duncanson, the shipbuilder, became insolvent. The factor on his sequestrated estate insisted that the ship in its then imperfect state was to be viewed as still the property of the bankrupt, the proceeds of which were to be divided among his creditors in general.

Mr. Simpson on the other hand contended that by the construction of the vessel in the terms of the contract, it became his, *specificatione*; the builder being to be considered merely as a mandatory who acquired, not for himself, but to his constituent.

The determination of the case was thought by the judges to depend, not so much on general principles of law as on the special terms of the agreement. By these the employer was to pay the price in different portions. Before payment, however, he had a right to see the work so far properly performed. Thus as the builder proceeded such an appropriation took place, as prevented his creditors from attaching the ship without refunding the sums advanced.

The Lords found the claim of Mr. Simp-

son to be preferable to that of the creditors of the bankrupt.

The report of the case in Bell's Comm. 7th ed., p. 189, after giving the facts, continues:

"The court held Simpson to be the proprietor in consequence of the particular nature of the bargain and the appropriation of the vessel from the time of laying the keel.

"Lord Justice Clerk M'Queen said, that, taken upon general principles, it was a nice question; but he thought the special nature and terms of the contract should decide it. In the case of a simple bargain for the building of a ship, the materials to be furnished by the builder, he would incline to the opinion that the unfinished vessel belonged to the builder or his creditors; but in the particular case when, by the contract, one third of the price was to be paid when the keel was laid, another when the building was advanced, he held that there was an appropriation of the vessel to the employer from the time of laying the keel. In this opinion Lord Eskgrove concurred. The rest of the court went chiefly on the ground that the creditors of Duncanson, taking the benefit of the contract, could not refuse credit for the payments which had been made to Duncanson himself."

(1) Court of Sess. Cases, 2d Series, vol. xxiv, p. 1038.

(2) Court of Sess. Cases, 3d Series, vol. vii, p. 59.

to sell for his own benefit, at least to the value over the advances.

[LORD BLACKBURN: In *Stim v. Grant* (') the Lord President Inglis, after stating the facts, said: "That was a state of possession *inconsistent with the personal con- [600 tract of sale," and that was exactly what was decided in *Troyme's Case* (').]

Here Roney was, at the time of his sequestration, the reputed owner of the vessel. In the respondents' letters to him and to shipbroker, the ship was called and treated as Roney's ship, and left at his order and disposal, and this acting led people to believe, and justly believe, that it belonged to him.

If it was held that the judgment below was right, and then, on the minor point, that they had a right to any surplus over the advances for which the vessel was sold, the interlocutor of the Second Division ought to be so varied as to give them that right.

Mr. Charles, Q.C., and Mr. Vary Campbell, maintained, for the respondents, this was an ordinary contract of sale, which the appellant did not challenge on the ground of fraud or as in view of the impending bankruptcy. The price set out in the contract was paid by checks. These were none the less payments because the respondents received accommodation bills of like amounts.

They relied on *Simpson v. Duncanson* ('); since that case there was no doubt that the transference of the property of a ship in the course of being built was an exception to the general rule of Scotch law requiring delivery in order to pass the property upon a sale. The only difference between this and that case was that there the instalments—which were only of importance as fixing the identity of the particular vessel sold—were to be paid at a fixed period. In *Orr's Trustee v. Tullis* (') Lord Neaves said: Upon payment of the instalments of the price, there passed so much of the ship as was then made: see also Bell's Comm. (7th ed.), 187 to 189; Bell's Prin., sects. 1083, 1828; and *M'Meehin v. Ross* (').

But the 1st section of the Mercantile Law Amendment (Scotland) Act was conclusive as against the appellant. The legal effect of the transference of the property to the respon-

(') Court of Sess. Cases, 2d Series, vol. xxiv, p. 1083.

(') Mor. 14,204; Bell's Com., 7th ed., p. 189.

(') 3 Co., 80; Chitty on Contracts, 11th ed., p. 384.

(') Court of Sess. Cases, 3d Series, vol. viii, p. 286.

(') Court of Sess. Cases, 4th Series, vol. iv, p. 154.

dents could not be lost by any plea of reputed ownership. The true owner might be barred from vindicating his property if he had acted collusively, *or, without reasonable cause arising in the ordinary course of business, held out the bankrupt, or allowed him to appear, as the owner, and has thereby misled third parties exercising ordinary care to their loss and damage: *Orr v. Tullis* ('); *Anderson v. Buchanan* ('); and 1 Bell's Comm. (7th ed.), 270. Here there was nothing in the evidence which showed that Roney was allowed to deal with the vessel as his own, or that he was represented as the unincumbered owner. It was impossible to regard leaving the vessel in the builder's hands in any degree collusive or out of the ordinary course of business. In *Holderness v. Rankin* ('), Lord Justice Turner observed, "The world has no right whatever to assume that every ship in a shipbuilder's yard is his own. The contrary is perfectly notorious. Shipbuilders very rarely build for themselves—they build for others under order given to them": see also *Master v. Ker* ('). *Sim v. Grant* (') was quite distinct—there it was held that the seller had the custody of the horse under conditions which were quite inconsistent with a contract of sale.

Apart from the written contract, the case against them was not strengthened by looking at—if it could be looked at—the parol evidence. Roney wanted advances upon the vessel; the respondents were advised that the only form the transaction could take must be one of sale; this was explained to Roney, and he deliberately agreed to sell the vessel. The original agreement was recorded in a memorandum of sale; a back-letter, or separate qualifying agreement, prohibiting an absolute transference of the proprietary in some of its effects to a security, was refused. The whole sum was advanced to Roney without any deduction, and he gave receipts which acknowledged that the price had been given and received in payment of the price of the vessel.

The legal position of the respondents is as absolute disponees; although, without prejudice to any equities, the appellant may have hereafter to establish against them to an account for any surplus over the advances which they 602] may make out of the sale *of the vessel; but the question as to these equities could not arise as long as the respondents are kept out of their property and the money.

(') Court of Sess. Cases, 3d Series, vol. viii, p. 936.

(') Court of Sess. Cases, 2d Series, vol. xi, p. 270.

(') 29 L. J. (Ch.), 753, at p. 759.

(') Court of Sess. Cases, 4th Series, vol. vi, p. 898.

(') Court of Sess. Cases, 2d Series, vol. xxiv, p. 1033.

The Solicitor-General in reply.

The Lords delivered judgment as follows:

LORD SELBORNE, L.C.: My Lords, your Lordships have listened to lengthened arguments in this case, but it appears to me that there are really only two questions which are ultimately material to the judgment. The first is, whether this is a contract of sale. Now, the appellant is under very great difficulties when he denies that it is a contract of sale, because upon the face of the instrument it is as carefully prepared and clearly expressed a contract of sale as anything can possibly be. And when we turn to the parol evidence, although no doubt on the one side and on the other there is a contrariety of statement, yet the purchasers (the respondents) most positively say that what is expressed in the instrument is that which was intended. It was done no doubt with the motive of securing the money which the purchasers had at stake, but it was done deliberately by way of purchase, because that was the best and most effectual way of accomplishing the object which the parties had in view. In corroboration of that, if corroboration were necessary, we find that the preliminary heads of the agreement, afterwards extended by this contract, begin, "Memorandum for contract of sale and building contract;" and, if they could properly be looked to, the entries in the book of the law agent are to the same effect. The statement on the other side is absolutely inconsistent with what appears upon the face of the instrument, and there is no reduction of the instrument asked for. It is not an allegation of something consistent with the instrument; it is an allegation entirely destructive of it. Therefore, as it appears to me, my Lords, the first point must be decided, in accordance with the instrument, that this was a sale, whatever may have been the motive, reason, and purpose which led to that sale; and its *bona fides* is really not in dispute.

My Lords, I think I may under those circumstances pass very *lightly over what was afterwards written and [603 done. There was a course of action upon this contract showing, as I think, a clear intention to adhere to it; because certain checks were from time to time drawn, by the persons who under the contract are technically at all events purchasers, for the whole amount of the agreed purchase-money, namely, £2,500, and £50 further, which represents, as I understand, certain extra work done upon the ship. The fact that those were payments of purchase-money under the contract is evidenced by a series of documents signed, as

often as any of those payments were made, expressly stating that they were "to account of the purchase price," payable by the purchasers for the ship in question, and these documents are all subscribed by Roney, who was, on the face of the contract, the seller. It is said that those payments are not to be regarded as real payments, because, not for all of them, but for all except £120 in the whole, there were acceptances given at the same time by Roney who received the money. But it seems to me to be perfectly clear that the object of those acceptances was simply to keep the purchasers out of cash advances until the period of time at which, if those payments had not been made, the purchase-money would have been payable under contract. Looking to this appropriation of payments made by the receipts for the checks, it appears to me to be an irresistible conclusion that as between Roney and the purchasers, the purchasers, and not Roney, were liable and bound to take up those bills; as in point of fact they did, although not as far as I know till after the sequestration. In that state of things, those bills having been taken up, the money has in fact been paid by the purchasers, and to the full amount.

My Lords, I cannot but observe that, whatever may have been the intentions of the parties with regard to any ulterior arrangements or settlements between them, I find nothing to lead me to the conclusion that those intentions extended so far as in any event whatever to pay, or repay, the £2,550 to the purchasers, otherwise than by means of the realization of the property purchased. Personal debt, independent of this contract, I do not find to have resulted from the transaction between the parties. What is alleged is this—and 604] there is undoubtedly some evidence in *support of it—that the parties contemplated that the purchasers would realize this ship by sale, but that having originally gone into the transaction in a certain sense with a view to their own security, and evidently not having fixed the £2,500 as a price in the ordinary way of bargain where the motive is to become possessed of and to retain the article purchased, the purchasers would not, if the article when sold fetched more than that amount, and any interest, costs, and so on which might be due, take advantage of any gain or profit, which, according to the letter of the contract, they might possibly be able to realize.

My Lords, I cannot say that I find in this evidence any very clear or satisfactory proof of a positive agreement having been at any time made for that purpose, although I do find something sufficient to show that there was a sense of

moral obligation, at all events on the part of the purchasers, so to act, and that it was their apparent intention so to act. It may be that what happened between them may raise that, beyond moral obligation, into a legal or equitable obligation, which the courts would enforce; and that certainly, I think, appears to have been the opinion of the learned judges in the court below. I will assume, for the present purpose, that there might be sufficient grounds for that conclusion, but at the most it can come to nothing more than this—that this being in intention expressly a contract of sale, there is a by-agreement, a collateral agreement, not in the form of a regular back bond, but of that nature, by reason of which, when the property purchased is realized by a subsequent sale, something will be done between the parties to adjust the mutual rights or equities which they have consented to establish between them. That appears to me not only not to destroy the sale as a sale, but really to proceed upon the contract as its foundation and basis, and to be something growing out of that contract which the parties, according to the hypothesis, agreed to do. Therefore, it appears to me that there is no ground whatever for treating this otherwise than as a sale.

I postpone the consideration of the correspondence which passed with a view to the subsequent sale or resale of this property, because that seems to connect itself naturally with another argument *on the question of reputed owner- [605 ship. Postponing that, I have first very lightly to pass over the argument founded upon the Scotch law as laid down in the case of *Simpson v. Duncanson* (¹), or supposed to be laid down in that case, independently of the Mercantile Law Amendment Act. I frankly confess that unless Duncanson's case is to be explained, as it was put at the bar, upon the footing of a constructive delivery, I do not very distinctly or clearly understand what the law is which that case decided: it is admitted to be exceptional. Upon the face of the decision itself, as reported by Lord Monboddo, it seems, it was not that the property in the ship had vested, but that there was an obligation on the part of the trustee or assignee in bankruptcy, taking the property, to repay the money which had been laid out upon it; which is a very different thing. But, put it as you will, the case of *Simpson v. Duncanson* (¹) does not appear to me to be an authority on which it is so satisfactory to rest the decision of the question now before your Lordships, as it is to rest it upon the terms of the Mercantile Law Amendment (Scot-

(¹) Mor. Dict., 14,204; also Bell's Com., 7th ed., vol. i, p. 189.

land) Act, which render a consideration of the difficulties which might have arisen in regard to Duncanson's case now immaterial.

By the general law of Scotland there must be tradition, or delivery, in order to give effect to a contract of sale; but by the Mercantile Law Amendment Act, for the express purpose of assimilating the law of Scotland, on such points, to the law of England, it is provided that where goods have been sold but have not been delivered to the purchaser, but have been allowed to remain in the custody of the seller, the mere want of delivery shall not enable the creditors in bankruptcy of the seller to defeat the sale. I have already said that, in my opinion, whether in some sense security was the object or not, there was here a sale in fact and in intent. The statute does not say that, there being a sale, that is to be taken out of the operation of the statute, because the parties may have some further contract or agreement, or understanding *inter se*, with regard to the subject of the sale. This is a case in which, if there was a sale at all, there was a sale unaccompanied with a delivery to the purchasers. The subject was allowed to remain in the custody of the seller. Every condition of this *statute was fulfilled, and I cannot see any ground upon which your Lordships can qualify those conditions of the statute for the purpose of defeating a *bona fide* transaction which is otherwise lawful. It appears to me, therefore, that the statute removes all the difficulties and questions which might otherwise have arisen as to the doctrine of *Simpson v. Duncanson* ⁽¹⁾, and that, having regard to that clause of the statute, the conclusion arrived at by the Court of Session is correct, the only difficulty upon that point being that the Court of Session have not based their conclusion upon the statute as distinctly as I think your Lordships will be disposed to do.

With regard to reputed ownership, I really think it is very far from necessary to say much, because beyond all question what Lord Justice Turner said in the case of *Holderness v. Rankin* ⁽²⁾ is true, that the fact of an unfinished ship being in a shipbuilder's yard is not enough by itself to raise a reputation of ownership on the part of the shipbuilder. I see nothing to distinguish this particular case from the ordinary one. If, in point of fact, this ship was not, after the sale, the property of the shipbuilders, the mere fact of its remaining in their yard unfinished could

⁽¹⁾ Mor. Dict., 14,204; also Bell's Com., 7th ed., vol. i, p. 189.

⁽²⁾ 29 L. J. (Ch.), 753.

not create the reputation of its being so; and whether or no it was left at their order and disposition for the purpose of creating a reputation of ownership, and to enable them to deal with it in a way which would bring it within the scope of the bankruptcy law, is a question to be determined upon the evidence: and I can see no evidence whatever in support of that proposition.

All that is referred to in support of it is a correspondence, showing plainly enough that communications passed from time to time between the shipbuilder in whose yard this vessel was, and those whom I have called the purchasers, and also the brokers; and latterly, with one intending purchaser. That correspondence taken as a whole (and every part of it is consistent with the rest) shows plainly, that it was intended and desired to find a purchaser for this unfinished vessel. References were made in the correspondence to the builder, but that would happen in the ordinary course of things if the person to whom the vessel belonged desired *that it should be sold, whether it belonged [607 to the builder, and whether it could be sold without his concurrence or not. Nothing was done or said from which I should infer that there was any authority which would have enabled him to deal with it without the concurrence and consent of the respondents. Their interest is several times referred to, and referred to in a manner which appears to me to be perfectly consistent with the absence of any reputation of ownership in the builder, or any intention to create it. No doubt, my Lords, in those letters the ship is frequently spoken of as the builder's ship; but the letters are not written to persons who are induced by their means to deal with the ship upon the footing of its being the property of the builder. They are not published to the world. Nothing appears to have happened with regard to these letters out of which a reputation of ownership could grow. Therefore, my Lords, it appears to me that there is nothing in that argument.

The last point that was mentioned, about the notice extending to the use of the building yard, may be said now to be at rest. It is admitted on all hands that such use as is necessary to enable the ship to be taken away, is proper and not in dispute. On the other hand, any indefinite use of the building yard your Lordships do not understand to be claimed, and certainly if it were claimed it would receive no countenance from anything which your Lordships are likely to say.

There remains only the question whether any addition

should be made to the interlocutor refusing the interdict. Now the interdict is simply sought for to prevent those things from being done according to the notice which are authorized by the contract, and necessary to enable possession to be taken of the ship, and the ship to be sold; and such use, as I have already said, to be made of the building yard as is absolutely necessary and indispensable. The interdict seeks to prevent that, and the question is, is it according to contract or not? If the contract is good, as I think your Lordships will hold it to be, those things appear to me to be authorized by the contract; and to refuse an interdict which would prohibit them, appears to me to be a necessary consequence. If your Lordships are of that opinion, it appears to me that to go further, and to enter into 608] the question of the ulterior rights of the *parties under any collateral agreement which may exist between them, would not only not be necessary to protect any rights which may exist under such an agreement, but in the present state of the evidence, I think your Lordships have not the materials upon which it would be possible or satisfactory to make any such declaration or right to attempt it.

On the whole my opinion is that the judgment under appeal is right, and I move your Lordships that the interlocutor be affirmed and the appeal dismissed with costs.

LORD BLACKBURN: My Lords, I am entirely of the same opinion.

It seems to me that it will be most convenient to consider first the true effect and construction of the Mercantile Law Amendment (Scotland) Act, 19 & 20 Vict. c. 60, s. 1. Now there is a preamble to that act explaining what the object of it is, and there is a similar preamble explaining the object of another act, for there was one passed for England and one for Scotland in the same year. The object of the two acts was this:—They were passed because there was a difference between the mercantile law of England and the mercantile law of Scotland which was found inconvenient in practice, and therefore it was desired to assimilate them in certain respects;—in some respects, doubtless, by making the English law similar to the Scotch, and in other respects by making the Scotch law similar to the English. It is therefore almost as important in construing that act to know what was the English law as to know what was the Scotch law, and I believe that upon neither is there any real dispute.

By the English law when there was what civilians would call *emptio perfecta*, and what English lawyers call a bargain and sale,—a contract for good and valuable considera-

tion to pass the property in particular chattels,—as soon as that was ascertained the property did pass, and the purchaser, although he might not be entitled to delivery, for there might be a vendor's lien or something else to prevent delivery, was entitled nevertheless to the property in the goods, to the *jus in re* as well as to the *jus ad rem*. That made a very considerable practical difference between the law of England and the law of Scotland, for the law of Scotland *was like the civil law upon which it was found- [609 ed, the maxim of the civil law being *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*. When there was not an actual delivery,—however complete the contract might be, although it was *emptio perfecta* to the fullest extent, amounting to all that in the great chapter of the Digest upon that subject has been considered to be *emptio perfecta*, and although every farthing of the price was paid,—yet the *dominium rei*, the *jus in re*, did not pass to the purchaser. Although he had the *jus ad rem*, and could, as long as the vendor was *sui juris*, compel the vendor to deliver to him the goods, he had not the *jus in re*. The practical result of that was that a creditor in Scotland might issue diligence and seize the goods, as still the goods of the vendor, that is to say, of the person who had sold them, although every farthing of the price had been paid; and further than that, if a sequestration had taken place, the vendor having become a bankrupt, the property passed to the sequestrators, and they were entitled to hold it, leaving the man who had perhaps paid every farthing of the price, to prove against the estate. That was the state of the law in Scotland, and it is obvious that there was a very considerable difference in the practical working of the English law and the Scotch. If a man purchased a quantity of goods, one half of which lay at Greenock and the other half at Liverpool, the creditors of the vendor might seize the goods in Greenock, but no creditor could touch the goods in Liverpool. In the case of a sequestration in Scotland, the sequestrator could take the goods in Greenock, but in the case of a bankruptcy in England, the assignees in bankruptcy could not touch the goods in Liverpool.

Those were the differences between the laws of the two countries.

Then comes the act of Parliament for the purpose of assimilating the two laws, and it says this:—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of

such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchase of the goods by the purchaser or others in his right from enforcing *the delivery of the same." Now I quite agree that that does not say that a contract of sale, *perfecta emptio*, in Scotland shall pass the property—shall pass the *jus in re*—and so far it does not assimilate it to the English law at all. The chief practical difference between the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser, was that his creditors by poinding and by sequestration could take the goods; there is a nominal difference now between the law of England and the law of Scotland as regards this. But for all practical purposes the law of Scotland, where there has been a contract of sale, though no delivery, is made identical with the law of England in the actual result.

Now, my Lords, an argument has been based upon the words of the act "where goods have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller." An attempt has been made to give a meaning to those words in which I cannot agree. I think that when you take the existing law of England and Scotland, as I have mentioned, and see what was the object of the Legislature in using these words, it is plain that they could not have intended by such words as these: "been allowed to remain in the custody of the seller," to introduce a new and complicated difference between the law of England and the law of Scotland. It is perfectly true, I think, as regards the law of Scotland, and it is to some extent true also as regards the law of England, that, independent of bankruptcy and before there is bankruptcy at all, where one person has allowed another to have possession of goods under such circumstances, and in such a way as to accredit that other person, and entitle him to sell them, or to acquire credit upon them,—if the true owner has allowed this to take place,—he should be responsible for the consequences, and it would be unjust for him to take away the goods to the damage of those who may, in consequence of his having accredited the other person, have acquired a right over them; though before there has been bankruptcy. In England when there has been bankruptcy this principle has been now for a very very long time carried out by force of a statute which we need not now consider, because it is not under the English statute of bankruptcy at all that the [611] question now arises. *In Scotland, I understand that something very similar to the principle I have men-

tioned exists, but it is not made by statute applicable to sequestration, or to a case where the party has failed, but it rests upon the grounds of common law. A simple creditor who issues process and poinds the goods might at common law poind them as against the person who has sold the goods, if that person retained the *jus in re*, though he had lost the *jus ad rem*; notwithstanding the statute he may poind them as a creditor where the possession of the vendor (to borrow the phrase used by Lord Justice Clerk Inglis in the case of *Sim v. Grant* (')), has been allowed by the purchaser to be such as is quite inconsistent with his having the *jus ad rem* by virtue of his personal contract of sale. It is very true that inasmuch as the purchaser had, by the common law of Scotland before this act was passed, got the legal right to the property, you could not properly say that he was "the reputed owner" of goods of which he was the actual owner himself. But the same principle which would have made a third person become the reputed owner, so as to give a creditor a right to seize them in his possession because the true owner had allowed them to be in his possession, appears to me to apply when you are applying the statute. If you can show that the man who had acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with the *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and, that being so, the Mercantile Law (Scotland) Amendment Act does not take the goods out of it. It says that delivery shall be good to make a contract of sale pass the property as against creditors, but it does not say that, without delivery, the property shall pass where, if there had been delivery and the goods had been left in this particular way with the vendor afterwards, they would have been made liable to the diligence of his creditors. So far, I think, the argument is quite right, but it is inapplicable to the present case. The effect of the contract of sale upon the goods with reference to the diligence of creditors is made exactly the same as if there had been an actual delivery: and as it would be under the English law.

*It has been endeavored to be argued that if there [612 was here, by the side of the contract of sale, a collateral agreement that the ship should be only held as security, that would prevent the contract of sale operating under the Mercantile Law Amendment Act so as to require no delivery to prevent any diligence or sequestration. I cannot agree

(') Court of Sess. Cas., 2d Series, vol. xxiv, p. 1083.

with that argument at all. I do not think that the point exactly arises here. I listened to the observations of the noble and learned Lord on the woolsack, and I agreed in the reasons which he gave. It seems to me that in this case, the contract of sale was agreed upon probably with the motive and intention that the party should thereby be able safely to make advances and have the security of the goods that had been sold to him; but whatever the motive and intention might be, it was as clear a contract of sale as anything could possibly be in its inception. I think that is perfectly plain. The evidence also leaves no doubt upon my mind that there was in this case a feeling of moral obligation on the part of Messrs. Wallace that if this ship should turn out to be worth much more than the £2,500, they would not keep the surplus. I think that that is repeatedly recognized in the different letters which passed. My present idea would be that, although there was that moral obligation or honorary obligation, it never was reduced to a contract at all. The Solicitor-General says: If there was such a contract, when was it made, where was it made? from which he concludes that it must have existed *ab initio*; I think on the contrary that it may be concluded that it never existed at all. That would be my impression certainly, if I were going to decide it; but that was not the impression of the court below, and it is not necessary to decide it. But supposing there was this completed collateral contract—not only an honorary contract, which I have no doubt that there was, but a binding, legal, and enforceable contract—that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act, which says that goods having been sold (as these were, although with a motive no doubt to produce this effect) as far as regards the rights of creditors of the vendor to prevent delivery of the goods either by sequestration or pouding, they shall have none, but the matter shall [613] stand as it would *under the English law. That, I think, is the point that will be decided here.

Upon the rest of the case, my Lords, I think I need hardly say anything more. Supposing it to be the fact that there was a collateral contract of that sort, doubtless in the possible event of the ship proving to be worth more than the advances which have been made, it may be that it will come into operation. I expect, however, and I fear for the sake of both parties, that it will turn out that it never will come into operation, because the ship will never sell for so much as has been advanced in respect of it. But that we have

nothing to do with. As to all the rest of the case, I think the interdict here is asked for against their fulfilling the very terms of the contract which they have made. The interdict would have the effect of preventing the purchaser from enforcing delivery of the ship. That is exactly what the Mercantile Law Amendment Act says shall not be done by the creditors of the seller by any process of law, including sequestration. It seems to me, therefore, that the interdict should be refused. And I do not see the slightest occasion for doing anything further; indeed, I think mischief would probably be done by declaring any rights or doing anything at all further. I quite agree in thinking that when there is a ship standing in a dockyard unfinished, as this was, the purchaser, if he has a right to the ship, must necessarily have a right to do what is necessary and proper for taking the ship out of that dockyard; and it is impossible to suppose that sequestration would prevent his doing it. I also agree that the parties neither claimed nor intended to claim any right to let the ship remain for two years in the dock and occupy the dock while it was being built. I do not think they claimed anything so unreasonable, and, consequently, I do not think it is necessary to say anything at all against their having such a claim. It seems to me that if they do make such a claim it must be left to the sequestrator, or the trustee, or the landlord of the dock (for I understand it is a leasehold) to take proper steps to eject them. It is not necessary now to say anything at all about it.

Therefore, my Lords, I quite agree that the interlocutor of the court below is right, and that the appeal should be dismissed.

***LORD WATSON:** My Lords, I entirely concur in {614 the view that your Lordships take upon this case.

I cannot doubt that the contract between these parties is in terms a contract of sale and nothing else. It is a binding contract reduced to writing, and I think it must, so far as it is not legitimately controlled by the terms of some other collateral contract, take effect between the two parties to it in terms as a contract of sale. I must confess that I very greatly doubt the competency of importing into the construction of that written contract a very great deal of the evidence that was taken in this case. It appears to me that a great deal of it consists of antecedent communings, which, according to the law of Scotland, can have no effect whatever in indicating what is to be the true construction of the concluded contract in which the parties embodied their stipulations in writing. The very purpose of reducing them

to writing was to get rid of all the doubt and perplexity that would arise as to the terms of the contract, if it had been left to stand upon the antecedent negotiations which had taken place, whether orally or by letter. But, my Lords, there is evidence as to the actings of the parties under the contract, as to their writings when the contract was in course, I may say, of execution; and those might, according to my view of the law of evidence in Scotland, be legitimately referred to as clearing up any point which might be doubtful. I cannot say that I find anything doubtful in this contract requiring elucidation from those sources, and upon looking to the correspondence and to the oral evidence, I can find nothing there which in the least degree conflicts with the construction which the contract, according to its own terms, ought in my opinion to receive.

Now the contention of the appellant was twofold. He first maintained upon the evidence that he controlled the contract and imported a new meaning into the contract by the evidence which he had led. The Lord Ordinary seems to have given effect to that view, and to have held that the contract did not set forth the true agreement between the parties, that their agreement in reality was one for a loan upon security and not for a sale and purchase; and if that [615] view were well founded, the judgment of *the Lord Ordinary undoubtedly is equally so. But, my Lords, I find it impossible to accept that view, and I therefore turn to the alternative view which was presented in argument at the bar. It was to this effect: that although in form this might be a contract of sale, it was in substance intended thereby to give a security only. That really resolves itself into an allegation that the motive of the parties in making the contract was to effect that which might more directly, had the circumstances of the case rendered it advisable, have been effected by a loan on the security of the vessel. But, my Lords, I cannot conceive that the contract is not to take effect according to its legal terms and legal meaning simply because it was intended thereby to give to the seller the benefits which they found it impracticable with safety to the purchaser to give him as a loan.

My Lords the question raised in this case which I come to next (and I take it in this order, because it seems to me to be sufficient for the disposal of the case) is the question of the effect of the Mercantile Law Amendment (Scotland) Act, 1856. Now, my Lords, being of opinion that this is a pure contract for sale, I think it necessarily follows that, according to the law of Scotland as it stands, and as it stood,

irrespective of the provisions of the Mercantile Law Amendment Act, it would have been valid as against the trustee in bankruptcy if it had been followed by actual tradition or delivery of the ship. I say nothing at present of constructive delivery as equivalent to actual, in a question with the trustee. That being so, what is the effect of the act? It is necessary to consider for a moment in determining that question how the law stood at the date of the passing of that statute. At that time, by the law of Scotland, a purchaser who had merely a personal contract of sale, could not demand delivery from a trustee in a sequestration of the seller. It was in the option of the trustee to proceed against him by enforcement of the contract for delivery of the vessel and suing for the price. But the purchaser, on the other hand, who had not got delivery, had no right to compel implement in a question with the trustee. Now the statute was passed for the purpose of assimilating the law of Scotland to that of England. As I understand the law of England, a concluded contract of sale—what in Scotland is termed *a concluded personal [616 contract of sale—has the effect of passing the property or interest in the property of the goods sold to the purchaser. In Scotland it undoubtedly had not that effect, and in order to place a purchaser in Scotland in the same position as a purchaser in England in questions with creditors of a bankrupt or the assignees or trustee in sequestration of a bankrupt, the Legislature did not enact that in Scotland the completion of a personal contract should pass the property, or have the effect of delivery, but it did enact, by the 1st section of the statute of 1856, that as in a question with the creditors of the seller, or with the trustee in a sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt had he remained solvent. That statute appears to me, my Lords, to supply all that is wanting to the completeness and efficacy of the contract in this case. Practically the effect of that section of the statute is to dispense with the necessity for delivery in the case of a purchaser who has a personal contract of sale. You have here a personal contract of sale, and you have here a statute dispensing with the necessity of actual delivery under it. That being so, I think we have, as your Lordships have already indicated, a satisfactory ground for deciding this case apart from all questions as to what the law of Scotland was before the act was passed.

Now, my Lords, I do not think it necessary to say much upon the question of what the law of Scotland formerly was,

because, seeing that the act of 1856 is held by your Lordships to apply to this case, any question of what the law was before that statute was passed really possesses little more than an antiquarian interest. I think the question raised is a very difficult and a very doubtful one. I rather think there are authorities in the law of Scotland which come nearer to the case presented by the respondents here than the case of which we have heard so much, namely, *Simpson v. Duncanson* (¹). Many cases might have been found which would have supported the argument on the part of the respondents with regard to the purchase of an article nearly completed, with instalments of the price paid up to a certain date, 617] the *article left in the hands of the vendor for the purpose of completion, there remaining another instalment which would have to be paid for work at that time undone. I dismiss that, however, because it appears to be unnecessary for the purposes of this case to determine anything in regard to it.

But it was said that the respondents in this case cannot have the benefit of the provisions of the Mercantile Law Amendment (Scotland) Act, because they have permitted Mr. Roney, the bankrupt, to deal with this vessel as if he were the owner of it (I dismiss the word "reputed" as not being very applicable to the case of a person in whom the legal estate is vested), and so to raise credit upon the faith of his being the true owner. Now, my Lords, without examining the doctrine of the law of Scotland, which certainly has rested, and was introduced, upon principles of equity, I think it is sufficiently clear that where a purchaser permits the seller to retain the goods and to deal with them as if they were his own, and as if no sale of them had actually taken place, he cannot have any claim to have those goods delivered to him, not as in a question with the seller of the goods, but as in a question with onerous creditors of the seller. But, in this case, whilst I admit that the principle contended for exists, and I believe it to be a sound principle, I cannot find the slightest ground of fact for holding that there has been any such holding out of himself as owner on the part of Mr. Roney in the present case, whether consented to by the respondents or not. I entirely concur with the observations that were made upon this part of the evidence by the noble and learned Lord on the woolsack.

My Lords, the learned judges in the court below have indicated that in this case it is their view that a collateral contract was constituted of a nature which undoubtedly

(¹) Mor. Dict., 14,204; Bell's Com., 7th ed., vol. i, p. 189.

may coexist with the contract of sale in question. I forbear to offer any opinion upon that point, because I cannot find any such case raised upon this record, and I do not think it desirable to indicate any opinion either for or against the appellant upon that point. But if the appellant has any such right, if he can instruct any such contract, I do not think his interest will be prejudiced by the form of the judgment pronounced in the court below. No doubt the appellant came into court complaining of the whole terms of the notice *which had been served upon 618 him by the respondents; but the mere fact of his complaining of the whole notice, and putting it all in his note of suspension and interdict, does not entitle him to object in this process to that notice upon all and every ground which he may discover. The very object of having a record is to limit the complainer (and especially in a summary proceeding like this) to those grounds of objection which are set forth upon the record. And here there is no allegation, as far as I can find, of any collateral contract, nor is there any allegation that he desires to have any reservation of his rights. He neither alleges that he has a right under a collateral contract, nor does he allege that that right has been invaded. It humbly appears to me, my Lords, that even under the notice it is quite possible for the respondents in this case to proceed without doing anything to prejudice that collateral contract, if it exists; and the form of the record is such as not to prevent the appellant, if he has good cause of complaint, from making that complaint and obtaining his appropriate remedy in a new and separate proceeding.

I therefore think that the judgment in the terms in which it was pronounced by the Lords of the Second Division ought to stand, as your Lordships have already proposed, as the judgment of this House.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th July, 1881.

Agent for appellant: *A. Beveridge.*

Agents for respondents: *Thomson, Son & Brooks.*

See 12 Eng. Rep., 845, 857 note.

In case of an executory contract to build a vessel, to be paid for in instalments as the work progresses, the title remains in the builder until the work is completed, and the rule is the same

where the vessel is built under inspection of a superintendent appointed by the purchaser.

The title to the vessel known as the "Stevens' Battery" (under the contract between Robert L. Stevens and the

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United States government), was vested in Robert L. Stevens at the time of his death, and, under his will, passed to Edwin A. Stevens, his residuary legatee: *Stevens v. Shippen*, 29 N. J. Eq., 602.

Evidence that a person seeing an unfinished piano in the maker's shop, offered to purchase it of him if he would finish it, that the offer was then and there accepted, that a bill of sale was then and there made, that the price was paid at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano and sufficient to pass the title as against a subsequent purchaser: *Thorn-dike v. Bath*, 114 Mass., 116.

Defendant signed a memorandum certifying that he had agreed to deliver to the plaintiff certain goods in his possession purchased by the plaintiff of one L., part of which he was to finish as soon as possible: Held, that on proof of demand and refusal the plaintiff was entitled to recover in trover: *White v. Beattie*, 28 U. C. Q. B., 487.

Where, by a contract for the construction of a ship, the builder is to furnish the requisite labor and materials, and to receive therefor a sum payable in instalments as the work progresses, this court will not enforce any arbitrary rule of construction in determining whether the title remains in the builder until the ship is delivered or ready for delivery, or whether the property in so much of her and on the payment of any instalment is completed passes to the other party; but it will carry into effect the intent of the parties, to be gathered from the terms of the contract and the circumstances attending the transaction.

Being thereunto authorized, the Secretary of the Navy entered into a contract with S., whereby the latter covenanted to construct a shot-and-shell-proof war-steamer for harbor defence. The Secretary was to appoint an agent to receive and, on account of the navy department, receipt for all materials delivered at S.'s establishment for the construction of the steamer,—the materials, when receipted for, to become the property of the United States, and to be marked "U. S." The agent's certificate to S.'s accounts for material and labor was the evidence on which payments were to be made to the latter.

S. executed a mortgage to the United States to secure his faithful performance of the contract, conferring upon the mortgagee, in case of failure to fulfill it, power to enter upon his establishment and sell the steamer. When the steamer should be fully completed by S. and accepted by the United States, the balance of the purchase price was then to be paid and the mortgage surrendered. S. died, and the vessel was never finished.

Held, 1. That the title to the unfinished vessel remained in S., and that no property therein vested in the United States. 2. That by the resolution of Congress, releasing and conveying to his heirs-at-law "all the right, title and interest of the United States in and to" the vessel, nothing passed to them: *Clarkson v. Stevens*, 106 U. S., 505.

A vessel having been built to order, the purchasers, who had paid three instalments of the price, intimidated by letter on the day previous to payment of the last instalment a reservation of their claim for damages in respect of an anticipated breach of contract due to deficient carrying capacity. Held, under the circumstances proved, notwithstanding a plea by the defenders to the effect that the pursuers were barred by their own actings in the matter, that the latter were entitled while retaining the vessel to sue an action of damages in respect of a disconformity of contract, which was only discovered subsequently to the delivery of the vessel. In a ship building contract, payment by instalments passes the property in the vessel as at the period of the payment of each instalment, and the buyer is not bound in case of disconformity to contract to reject his own property, but is entitled to retain the vessel and claim damages: *Spencer v. Dobie*, 17 Scot. L. Repr., 370.

Where one contracts with another for a chattel not in existence, but to be made for him, though he pays the whole price in advance or from time to time as the work progresses, he acquires no title in the chattel until it is finished and delivered to him, unless a contrary intent is expressed.

And where the parties agree that the title shall at once vest in the buyer, so that the sale is complete as between the parties, yet the retention of possession by the maker leaves the chattel

open to attachment by the creditors of the latter.

Where the maker of certain chattels fraudulently represented to the buyer that they were substantially completed and ready for delivery, and the buyer, trusting the representations, paid the balance of the contract price, and the maker soon after made an assignment in insolvency, it was held, in an action of replevin brought for the chattels against the trustee in insolvency, that this fact could not affect the case, inasmuch as there was still no delivery of the chattels and no title that was good against the creditors of the maker.

A trustee in insolvency represents creditors, and has all the rights in such a case that creditors could have acquired by attachment: *Shaw v. Smith*, 48 Conn., 306.

A ship builder contracted to build a vessel to be paid for in instalments as the work progressed; while she was on the stocks unfinished the builder died, payments having been made on her; she was appraised at the amount which had been paid. The executors having no funds, the vessel being subject to liens and there being doubt as to the title a purchaser would take, with other circumstances rendering it uncertain whether more than a small amount would be realized from a sale, under the advice of counsel the executor delivered the vessel to the persons for whom it was being built, and took credit for the amount of the appraisal in it. An auditor found that under the circumstances the executor had acted wisely and for the best interest of the estate; the Orphan's Court approved the finding; the Supreme Court on appeal affirmed the decree.

It seems that a vessel on the stocks, before coming under the dominion of the admiralty law, does not differ from any other kind of personal property, and no title papers before completion and delivery are necessary unless under a special contract: *Derbyshire's Estate*, 81 Penn. St. R., 18, affirming 32 Leg. Int., 292, 12 Phila., 627; citing *Scull v. Shakspear*, 75 Penn. St. R., 297.

Where a bargain for the sale of specific, designated, property is struck, the quantity, quality, and price of the goods determined and nothing remains to be done by the seller before delivery, the property in the goods passes to the

purchaser unless the parties have agreed otherwise, even on a cash sale without payment, subject only to a lien for the price. The goods are at the risk of the purchaser: 24 Eng. Rep., 219 note; 27 id., 133 note; 2 Bl. Com., 447-8; 2 Kent's Com., 492; Sto. on Sales, §§ 281, 300, 303, 308a.

Canada, Upper: *Gilmore v. Supple*, 11 Moore, P. C., 551.

English: *Hinde v. Whitehouse*, 7 East, 558, 571; *Carruthers v. Payne*, 5 Bing., 270.

Georgia: *Flanders v. Maynard*, 58 Geo., 56.

Illinois: *Barron v. Windon*, 71 Ills., 214; *Webster v. Granger*, 78 id., 231; *Straus v. Minzesheimer*, Id., 492; *Shelton v. Franklin*, 68 id., 333; *Frost v. Woodruff*, 54 id., 55; *Seckel v. Scott*, 66 id., 106; *Gravitt v. Mugge*, 89 id., 218; *Race v. Hanson*, 12 Bradw., 605.

Kentucky: *Newcomb v. Cabell*, 10 Bush (Ky.), 400.

Maine: *Phillips v. Moore*, 71 Me., 78.

Massachusetts: *Pratt v. Parkman*, 24 Pick., 42, 46; *Tuxworth v. Moore*, 9 id., 347; *Sumner v. Hamlet*, 12 id., 76.

Michigan: *Whitcomb v. Whitney*, 24 Mich., 486; *Wilkinson v. Holiday*, 33 id., 386; *Kling v. Fries*, Id., 275.

But see *Webster v. Bailey*, 40 Mich., 641.

Missouri: *Rickey v. Zeppenfeldt*, 64 Mo., 277; *Dober v. Carson*, 72 id., 209; *Erwin v. Arthur*, 61 id., 886; *Dowell v. Taylor*, 2 Mo. App., 329.

Nebraska: *Uhl v. Robinson*, 8 Neb., 272.

New York: *Groat v. Gile*, 51 N. Y., 431; *Olyphant v. Baker*, 5 Denio, 379, 882; *Dexter v. Norton*, 55 Barb., 252; *Whitney v. Allaire*, 2 N. Y., 311; *Hurd v. Cook*, 75 id., 454; *Smith v. Edwards*, 29 Hun, 498; *Conderman v. Smith*, 41 Barb., 404, and *Van Hoozen v. Corey*, 34 id., 10, as explained 49 N. Y., 40; *Schommaker v. Verbalen*, 9 Hun, 138; *Bradley v. Wheeler*, 4 Rob., 18, 26, 44 N. Y., 495; *Allen v. Chapman*, 17 N. Y. Weekly Dig., 515, 516; *Bates v. Conkling*, 10 Wend., 389; *Lansing v. Turner*, 2 Johns., 12, 16; *Brewer v. Salisbury*, 9 Barb., 511; *Tyler v. Strang*, 21 Barb., 198, 206.

See *Pierson v. Hoag*, 47 Barb., 243.

Ohio: *Warner v. Porter*, 1 Western Law Month., 104.

United States, Circuit and District: *Barrett v. Goddard*, 3 Mason, 107.

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Victoria: *Isaacs v. Skellorn*, 1 Vict. Rep. (Law), 46.

Wisconsin: *Fletcher v. Ingram*, 46 Wisc., 191.

And if payment be made, the title passes absolutely to the purchaser:

Massachusetts: *Higgins v. Chessman*, 9 Pick., 10.

New York: *Lansing v. Turner*, 2 Johns., 12, 16.

On an interpleader issue to try the title to two locomotives, it appeared from the finding of the jury, that in September, 1858, when they were half finished, the plaintiffs verbally agreed with G., the manufacturer, to buy them from him for \$16,000, payable as he might require it, for which they were to be furnished by him; and on the 8d of January, 1859, by deed reciting this arrangement, G. conveyed them to the plaintiffs. The defendant claimed under an execution issued after the agreement, and when that was made there was an execution in the sheriff's hands, at the suit of a third party, which was subsequently paid.

Held, 1. That by the verbal agreement the property passed, and that the chattel mortgage act did not apply, a change of possession being impossible under the circumstances.

2. That the execution in the sheriff's hands clearly could not affect the plaintiffs' claim as against the defendant.

8. That if it were necessary to determine that point, the locomotives were sufficiently described in the deed of the 3d of January, set out below: *Burton v. Bellhouse*, 20 U. C. Q. B., 60.

One P., in January, 1860, agreed to build for the Grand Trunk Railway Co., 100 cars of a specified pattern, to be delivered in four months and a half from that time on their track at Toronto free of charge, the company to pay \$825 for each car, payments to be made monthly on the estimate made by a person appointed by the company on materials furnished and work done; "payments to be made to the satisfaction of the Bank of Upper Canada, who are to act as receivers."

All but sixteen cars were delivered, and these sixteen the inspector of the company had approved of, and they were sent to the Suspension Bridge to wait for the springs, which the company were to furnish.

On the 24th of September, 1860, the

bank and the Grand Trunk Railway Co. entered into an agreement reciting the contract, and that the bank had made large advances on account of it, and had agreed to advance the necessary sum to complete it and to acquire the title to the cars.

The company then assigned all their interest in the agreement and cars to the bank, and the bank leased them back to the company for three years at a rent named, with a proviso that on payment of their debt to the bank the cars should revert to the company. After this P. received moneys from the bank on account of the contract: Held, that by the agreement the cars vested in the company before delivery; that the bank were not precluded by their charter from taking security upon them, and that they were entitled therefore as against an execution creditor of P.: *Bank v. Killaly*, 21 U. C. Q. B., 9.

Where one agreed to sell to another a threshing machine which had been loaned to, and was in the possession of, a third party, and gave to the purchaser an order on the party in possession for the machine, the purchaser executing his note for the purchase-money; held, in the absence of proof that the parties so intended, that this did not constitute a delivery of the machine, or vest the title thereto in the purchaser.

To constitute a delivery in such case, the party in possession must deliver the machine, or consent to attorn to the purchaser so as to become his bailee.

If the purchaser in such case voluntarily consents to let the party in possession retain the machine for a definite period of time, as a matter of favor, this will operate a waiver of the delivery; but no such waiver can be implied from the fact, that the purchaser, acting under the moral coercion of necessity dictated by the situation, as where the bailee refuses to deliver until he has finished a certain amount of work, or agrees to deliver only after he has finished the work, merely submits to the bailee's continued possession as the best arrangement he can make under the circumstances. The party in possession does not thereby become the bailee of the purchaser, but he continues his original custody

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of the machine as the bailee of the vendor: *Edwards v. Meadows*, 71 Ala., 42.

Where a quantity of goods bargained for at a certain rate is actually *delivered*, the sale is complete, notwithstanding the goods are to be counted, weighed or measured in order to ascertain the amount to be paid for them, or something to be done for the benefit of the purchaser.

English: *Carruthers v. Payne*, 5 Bing., 270.

Illinois: *Shelton v. Franklin*, 68 Ills., 333; *Seckel v. Scott*, 66 id., 106; *Gravitt v. Mugge*, 89 id., 218; *Wabash, etc., v. Shryock*, 9 Bradw., 323.

Indiana: But see *Pittsburgh v. Noel*, etc., 77 Ind., 110.

Massachusetts: *Macomber v. Parker*, 13 Pick., 175; *Sumner v. Hamlet*, 12 id., 76.

Michigan: *Whitcomb v. Whitney*, 24 Mich., 436; *Colwell v. Keystone*, etc., 36 id., 51.

New York: *Crofoot v. Bennett*, 2 N. Y., 258, affirming 1 Sandf., 516; *Hyde v. Lathrop*, 2 Abb. App. Dec., 436, 3 Trans. App., 320; *Groat v. Gile*, 51 N. Y., 431; *Brewer v. Salisbury*, 9 Barb., 511; *Tyler v. Strang*, 21 id., 198, 206.

United States, Circuit and District: *Barrett v. Goddard*, 3 Mason, 107.

Wisconsin: *Fletcher v. Ingram*, 46 Wisc., 191.

So if the seller deliver a larger quantity to the buyer, under an agreement that a *specific number* of a larger number of articles to be selected shall pass to the buyer, the latter takes title to the number, and the title to the remainder remains in the seller.

See 14 Eng. Rep., 577 note.

Kansas: But see *Bailey v. Long*, 24 Kans., 90.

Massachusetts: *Valentine v. Brown*, 18 Pick., 549.

Missouri: *Rickey v. Zeppenfeldt*, 64 Mo., 277.

New Brunswick: *Close v. Temple*, 20 New Brunsw. (4 Pugs. & Burb.), 234.

New York: *Crofoot v. Bennett*, 2 N. Y., 258, affirming 1 Sandf., 516; *Clark v. Griffith*, 24 N. Y., 595, 597-8; *Smith v. Edwards*, 29 Hun, 493.

Otherwise where the parties intended a sale of only a portion of a mass, and neither intended title to any specific

number should pass, but only that such number as should pass inspection, when inspected, should pass to the purchaser.

Arkansas: *Person v. Wright*, 35 Ark., 69.

Canada, Upper: See *Hayes v. Nesbit*, 21 U. C. Com. Pl., 101.

New York: *Stephens v. Sauter*, 49 N. Y., 35, distinguishing *Van Hoozer v. Cary*, 84 Barb. 10; *Conderman v. Smith*, 41 id., 404; *Cooke v. Millard*, 65 N. Y., 352.

Where something remains for the seller to do before delivery—i.e., to cart hay sold from the seller's barn to a railway station, and there *deliver* it on cars for shipment,—the title does not pass on contract for sale.

Canada, Upper: *Robertson v. Strickland*, 28 U. C. Q. B., 221.

Canada, Lower: *Le Mesurier v. Logan*, 1 Rev. de Legis., 176; and see decision on appeal, 6 Moore, P. C., 116.

English: *Logan v. Le Mesurier*, 6 Moore, P. C., 116.

Illinois: *Frost v. Woodruff*, 54 Ills., 155.

Indiana: *Pittsburgh, etc., v. Noel*, 77 Ind., 110.

Kansas: *Bailey v. Long*, 24 Kans., 90.

Kentucky: *Newcomb v. Cahill*, 10 Bush (Ky.), 460.

Massachusetts: *Higgins v. Cheesman*, 9 Pick., 10.

Michigan: *McDonough v. Sutton*, 35 Mich., 1; *Crapo v. Seybold*, 35 id., 169.

Missouri: *Ober v. Carson*, 63 Mo., 209.

New York: *Evans v. Harris*, 19 Barb., 416, 427-8; *Allen v. Chapman*, 17 N. Y. Weekly Dig., 515, 516; S. C., mem., 30 Hun, 312, distinguishing *Bradley v. Wheeler*, 44 N. Y., 496; *Ferry v. Wheeler*, 25 N. Y., 520.

But see *Smith v. Edwards*, 29 Hun, 493.

Ohio: *Warner v. Porter*, 1 Western Law Month., 104.

A mortgage for a certain number of bales out of a crop of cotton is uncertain in description, until separation or designation of the specific property, no action of replevin can be maintained for it: *Person v. Wright*, 35 Ark., 169.

Plaintiffs contracted with P. to put up 30,000 cans of lobsters for them, during the fishing season of 1879, he

to paint, label and prepare the cans ready for shipment before delivery. The plaintiffs to pay 5½ cents per can, and furnish the cans, paint, &c.; property in the fish to be the plaintiffs from the time the cans were filled.

Held, in an action of trover against B., a purchaser at a sale under an execution against P. of 33 cases of cans put up by P., which at the time of seizure and sale were not ready for delivery, that the fact that something remained to be done by P. before they would be ready for delivery, did not prevent the property vesting in the plaintiffs: *Murray v. Bourgeois*, 4 Pugs. & Burb., 149.

An agreement to sell, with a delivery, may complete the sale of personal property and vest the title in the purchaser, although no definite price has been fixed. Whether the sale is complete and the title passes depends on the intention of the parties, and that may be shown by circumstances as well as by declarations.

An agreement to purchase a lot of books, where a part of the price is paid, possession delivered, and the amount to be paid fixed, if the books should prove to be as represented, will pass the title as against a creditor of the vendor levying subsequently: *Callaghan v. Myers*, 89 Ills., 566.

Plaintiff, through his agent, bought from A. & Co. a certain quantity of wheat, which was to be loaded on or before a day named, or as soon as bags and cars could be furnished by plaintiff for same. Plaintiff paid on account portion of the price agreed upon, and furnished bags to the vendor, who filled them, but no cars were sent by him to take the wheat away. Whilst the wheat was lying ready to be dispatched, and after the day named for loading it, defendants, holders of a warehouse receipt, demanded of the vendors the wheat covered by it, when plaintiff's wheat, some of which, amounting to 250 bushels, had been weighed, was delivered to and received by them. There was no demand and refusal of plaintiff's wheat, nor did plaintiff notify defendants that the wheat was his.

Held, that plaintiff was not entitled to possession of the wheat, and could not, therefore, maintain trover against defendants for it: *Butters v. Stanley*, 21 U.C. Com. Pl., 402.

A payment in good faith is needed to complete a *bona fide* purchase.

B., who knew that an execution was out against H., bought a buggy from him; H. had driven into town with the buggy drawn by a span of horses, which he fastened to a water-trough without unhitching. B. went over to him and bargained for the buggy, and it was agreed that H. should have credit for it on the books of B.'s firm, and might have it to go home with. B. then went to his store and directed the clerk to give H. credit, which was done by an entry on the day book. H. was not present, and did not see or know of the entry. Meanwhile H. went to a law office, and the sheriff found the team and levied on the buggy. There was no bill, itemized account, receipt, acceptance, earnest money, nor memorandum or any writing signed by either party. The buggy was never in B.'s actual or constructive possession. Held, that the whole transaction was executory and no title passed. It was a sale on credit to be settled on balancing accounts, and as the purchaser knew of the execution, was presumably fraudulent: *Webster v. Bailey*, 40 Mich., 641.

An agreement for an exchange of horses, with a right to rescind the bargain within a certain time, vests the title to the horses in the respective parties on the exchange, and the title remains in them until the agreement is fully rescinded. If the party who has a right to rescind, exercises that right properly and in time, and restores or offers to restore what he received, the title reverts in the other party, and the party offering to rescind may recover back what he gave in exchange.

But where, as in this case, the defendant took from the bailee of the plaintiff the horse he had exchanged with the plaintiff, in the absence of and without the knowledge of the plaintiff, and subsequently, on the same day, returned the horse and note received of the plaintiff, to the residence of the plaintiff, and leaving them in care of the family of plaintiff's father, in the absence of the plaintiff:

Held, it not appearing that the plaintiff had in any way accepted the returned horse and note, that these *ex parte* acts of the defendant were insuf-

ficient to divest the plaintiff of his title to the horse which he had acquired by the exchange, although the defendant claimed that under the agreement the plaintiff's warranty of his horse had failed, and he had previously given the plaintiff notice that he should rescind the bargain on that ground: *Stoddard v. Graham*, 23 How. Pr., 518.

The parties may expressly agree that the title to certain property to be manufactured shall, as soon as manufactured, vest in the purchaser.

Canada, Upper: *Kelsey v. Rogers*, 82 U. C. Com. Pl., 364.

Michigan: *Whitcomb v. Whitney*, 24 Mich., 486.

New Brunswick: *West v. Rutledge*, 1 Pugs. & Burb., 674; *Sprague v. King*, Id., 24P; *Gibson v. McKean*, 1 Pugs., 299.

New York: *Smith v. Edwards*, 29 Hun, 493; *Tyler v. Strang*, 21 Barb., 198, 208.

Wisconsin: *Fletcher v. Ingram*, 46 Wisc., 191.

There must, however, be delivery by the seller and acceptance by the buyer.

Canada, Upper: *Pew v. Lawrence*, 27 U. C. Com. Pl., 402; *Gowans v. Consolidated Bank*, 43 U. C. Q. B., 318; *Robertson v. Strickland*, 28 id., 221.

Indiana: *Pittsburgh, etc., v. Noel*, 77 Ind., 110.

Kansas: *Bailey v. Long*, 24 Kansas, 90.

Michigan: *Webster v. Bailey*, 40 Mich., 641.

New Brunswick: *New Brunswick, etc., v. McLeod*, 1 Pugs. & Burb., 257, affirmed 5 Can. Sup. Ct. R., 281.

New York: *Brand v. Focht*, 1 Abb. Appeal Cases, 185, 3 Trans. App., 357; *Porter Manufacturing Co. v. Edwards*, 29 Hun, 509.

Delivery and acceptance may be symbolical or implied, as by delivery of a warehouseman's receipt, or in any other manner evidencing an intention to make delivery and to accept the property. Much, often depends upon the character of the property. Under the *statute of frauds*, however, some act of the parties transferring possession is however necessary: *Chipman's N. B. (M.S.)*, 49 note, and cases cited; 1 Amer. L. Rev., 413-431.

Arkansas: *King v. Jarman*, 35 Ark., 190.

Canada, Upper: *Supple v. Gilmore*, 5 U. C. Com. Pl., 318; 11 Moore, P. C., 551; *Coleman v. McDermott*, 5 U. C. Com. Pl., 308.

Illinois: *Shelton v. Franklin*, 68 Ills., 338.

Kentucky: *Newcomb v. Cahill*, 10 Bush, 460.

Michigan: *Wilkinson v. Holiday*, 33 Mich., 386; *Colwell v. Keystone, etc.*, 36 id., 51.

Missouri: *Erwin v. Arthur*, 61 Mo., 386.

New Brunswick: *Fiddles v. Henderson*, Chp. N. B. (M.S.), 47; *Murray v. Bourgeois*, 4 Pugs. & Burb., 149.

New York: *Shindler v. Houston*, 2 N. Y., 261; *Woodford v. Patterson*, 32 Barb., 630; *Wilkes v. Ferris*, 3 Johns., 335, 4 Amer. Dec., 366; *Good v. Curtiss*, 31 How., 4, 11; *Smith v. Edwards*, 29 Hun, 493.

See *Brand v. Focht*, 1 Abb. Appeal Cas., 185, 3 Trans. App., 357.

Wisconsin: *Fletcher v. Ingram*, 46 Wisc., 191.

Where it appears that there has been a complete and full delivery of property, in accordance with a contract of sale, the title passes, although there remains something to be done in order to ascertain the total value at the rates agreed upon.

In an action to recover the alleged contract price for a quantity of lumber sold to defendant, plaintiff's evidence tended to show that defendant contracted to purchase of plaintiff all the lumber which the latter should deliver at a place designated on the D. river, before the first rafting freshet in the spring. The lumber to be paid for at a price specified for the good and for the culled, defendant to furnish a man to cull and pile, and the lumber to be counted on the bank or estimated in the raft. Plaintiff commenced drawing lumber to the place designated, an employe of defendant assisting in culling and piling, but before the lumber so drawn had been counted or estimated, a portion of it was swept away by a flood. Held, that the evidence was sufficient to sustain a finding of a valid delivery and acceptance, and to sustain a recovery; that the contract was not an entirety, and a delivery of the whole amount contracted for was not necessary in order to pass title: *Burrows v. Whitaker*, 71 N. Y., 201,

distinguishing *Kein v. Tupper*, 52 N. Y., 550; *Andrews v. Durant*, 11 N. Y., 40.

One W., being the owner of a tract of timber land, with a sawmill thereon, entered into a contract with W. & S., by which the latter agreed to stock said mill with logs, "at the agreed price of \$2.50 per thousand for the green timber standing, and \$2.25 for all timber cut down and now cut into logs." The contract provided that "all the logs and lumber manufactured from said logs" W. & S. "are to have the title to, and belong to them absolutely;" in consideration thereof, W. & S. further agreed to advance on "the good and merchantable lumber" when sawed, \$2 per thousand. The logs were to be sawed under the direction of W. & S., who were to receive \$1.50 per thousand for drawing the merchantable lumber to the railroad or river; they were to sell the lumber, and after deducting from the net proceeds of sale the amount due them, under the contract, they agreed to pay to W. the balance. W. & S. were to have the bark peeled from the logs cut by them, with the right to peel the logs already cut, if W. did not. In an action by plaintiff, as assignee of W. & S., to recover for the conversion of merchantable lumber cut from logs delivered under the contract, held, that it was competent for the parties to determine in whom the title should be during the various stages of the manufacture; that under and by the contract, the title to all the logs, as soon at least as they were delivered at the mill, vested in W. & S.; that the provision as to the bark was not inconsistent with the interpretation; and that the fact that W. had an interest in the residue of the avails was entirely consistent with it.

(*Stephens v. Santee*, 49 N. Y., 35, distinguished.)

Also, held, that defendant, appearing in the case as a mere trespasser, could not raise the objection that the transfer by W. & S. to plaintiff was in fraud of the rights of W.

W. & S. executed to plaintiff a bill of sale of 200,000 feet of lumber, "now at the mill and being made, delivered on the bank of Allegany river," and thereafter, and prior to the concurrence by defendant, certain piles were

measured at the mill, marked and set apart. Held, that the transfer was complete, and the title vested in plaintiff: *Hurd v. Cook*, 75 N. Y., 454.

The plaintiff contracted with two of the defendants for the manufacture by them of five thousand saw-logs to be delivered at the mouth of the River Trent, for which he was to pay, partly by instalments during the progress of the work, and the residue when the logs should be delivered at the place designated, and at the same time, or immediately afterward, it was verbally arranged that logs, as they were manufactured, should be marked with the plaintiff's initials, and should be delivered to him as a security for his advances, without prejudice to the agreement for their being conveyed to the mouth of the river. The stipulated advances were duly made, and the logs, as manufactured, were marked with plaintiff's initials, but not otherwise delivered to him. Held, that the manufacturers could not afterwards dispose of these logs to the prejudice of the plaintiff; and having attempted to do so by selling and delivering them to a third person for value, but who had notice of the plaintiff's claim, an injunction was granted to prevent their removal by such person: *Fuller v. Richmond*, 2 Grant's Chy. (Canada), 24.

M., by agreement with the defendants, agreed to manufacture for and supply to them certain timber, which he was to mark with defendant's name and deliver at one of two places on Sturgeon Lake, to boom it securely, and complete the delivery by a day named. Defendants were to pay two-thirds of the contract price as the work proceeded, and the rest on completion of the contract. No rough, coarse, or cull timber was to be accepted, and the timber was to be measured by defendants when delivered, or from time to time, M. to have it measured by a culler if not satisfied with defendants' measurement, and the expense thereof to be borne equally.

The timber was made by M. from his own trees, marked by him with defendants' name as made, and hauled to the lake and boomed there; but it had not been measured or accepted by defendants, nor delivered to them, nor dealt with by them as their own. They

had made advances from time to time, but there was a disputed balance claimed by M.

M., under these circumstances, put the men he had employed in manufacturing the timber in possession of it, as security for their wages. Defendants took it out of the possession of the plaintiff, one of the men, and the plaintiff brought trespass: Held, that the property in the timber had not passed to the defendants, and that the plaintiff therefore could recover.

But, *semble*, that in equity defendants would have a prior claim upon it to the extent of their advances: *Robertson v. Strickland*, 28 U. C. Q. B., 221.

The question whether a delivery was intended, or actual delivery was intended to be waived, is frequently one of fact for the jury.

Georgia: *Flanders v. Maynard*, 58 Geo., 56.

Massachusetts: *Weld v. Conner*, 98 Mass., 152; *Shumway v. Rutter*, 8 Pick., 443; *McComber v. Parker*, 13 id., 182-3.

Michigan: *Wilkinson v. Holiday*, 33 Mich., 886.

New York: *DeRidder v. McKnight*, 13 Johns., 294; *Bates v. Conkling*, 10 Wend., 389; *Coonley v. Anderson*, 1 Hill, 520; *Brewer v. Salisbury*, 9 Barb., 511.

Pennsylvania: *Chase v. Ralston*, 30 Penn. St. R., 539.

Wisconsin: *Fletcher v. Ingram*, 46 Wisc., 191.

The seller may retain the goods sold, or the portion thereof not delivered, or until the purchase price be paid, and may, in good faith, sell the same at the best price he can obtain and recover of the purchaser the deficiency, or may

sue for the contract price: 24 Eng. Rep., 219 note; 27 id., 133 note.

Canada, Upper: But see *Dempsey v. Carson*, 11 U. C. Com. Pl., 462.

English: *Dixon v. Yates*, 5 Barn. & Ad., 313; *Page v. Cowasgee*, L. R., 1 Priv. Coun., 128.

Michigan: *Brownlee v. Bolton*, 44 Mich., 218; *Holland v. Rea*, 48 id., 218.

Nebraska: See, in this State, *Eaton v. Reddick*, 1 Neb., 305.

New York: *Hunter v. Wetsel*, 84 N. Y., 549; *Harrington v. Clark*, 10 Weekly Dig., 471, mem. 82 N. Y., 606; *O'Brien v. Jones*, 47 N. Y. Super. Ct. R., 67.

Pennsylvania: See *Washabaugh v. Strauffer*, 81 Penn. St. (Sup.), 497.

When by an agreement for sale the title is to pass, not upon delivery but upon a subsequent payment, the vendor, the vendee being in default, may retake the goods from one claiming through the vendee, and the agreement is valid though the goods were not in existence so as to be a subject of bargain and sale when the agreement was made, if when delivered they were delivered under the agreement: *Benner v. Puffer*, 114 Mass., 376.

If the vendee leave goods with the vendor after contract of sale executed, the law implies a promise by the vendee to pay the expense of keeping them: *Roe v. Martin*, 2 Cow., 417; *Diblee v. Corbett*, 9 Abb., 200.

The court will decree the specific performance of a contract for the manufacture and sale of saw-logs, where they are capable of being identified and possess a peculiar value for the purchaser: *Stevenson v. Clarke*, 4 Grant (U. C.), 540; *S. P., Fuller v. Richmond*, id., 657.

[6 Appeal Cases, 619.]

J.C.*, June 30; July 15, 1881.

[PRIVY COUNCIL.]

619] *CHARLES PALMER, *Defendant*; and MARK HUTCHINSON, *Plaintiff*.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Jurisdiction—Suit against Public Officer in his Official Capacity—Liability of Servants of the Crown—Petition of Right.

In a suit against Her Majesty's Deputy Commissary-General for Natal, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as the price or hire of certain wagons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employees, and for general damage:

Held, on exceptions by the defendant to the jurisdiction of the court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; and that there was no cause of action against him.

The Government revenue cannot be reached by a suit against a public officer in his official capacity.

Quere, whether the court would have had jurisdiction if a petition of right had been presented and the Crown had ordered that right should be done.

APPEAL from a judgment of the Supreme Court (Dec. 8, 1879), overruling the appellant's exceptions to the jurisdiction of the court and also his exceptions as set out in their Lordships' judgment to the declaration and action, except that the allegation No. 2 as to proceeding by petition of right was ordered to be struck out, and the exception No. 1 where it relates to the damages claimed for alleged tortious acts of officers of Her Majesty's service, was allowed.

The proceedings in the suit, and the material passages in the judgment of the Chief Justice, are set out in their Lordships' judgment.

620] **The Attorney-General* (Sir H. James, Q.C.), (with him, Mr. A. L. Smith and Mr. Danckwerts), for the appellant, contended that the Supreme Court had no jurisdiction in the case. The object of the suit was to charge the Crown or its revenues or property (whether situated within or without the jurisdiction). That could not be done by the device of suing a servant of the Crown in his official capacity. There was no cause of action against the appellant, and no liability incurred by him either in his personal or official

**Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

capacity: *Sands v. Cooper* ⁽¹⁾; *Gidley v. Lord Palmerston* ⁽²⁾; Chitty on the Prerogative [ed. 1820], pp. 31, 32; Natal Ordinances, No. 10, 1857. Redress against the sovereign cannot be obtained otherwise than by petition of right, nor can Crown property be taken in execution by ordinary process of law. Special legislation enables the Secretaries of State for India and for War, and the Postmaster-General, to be sued. Reference was made to The Petitions of Right Act, 1860, 23 & 24 Vict., c. 34, and Blackstone, bk. 1, c. 7; the Parlement Belge, judgment of Brett, L.J. ⁽³⁾; *Cushing v. Dupuy* ⁽⁴⁾; *Feather v. Reg.* ⁽⁵⁾.

The respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK: This is an appeal from a judgment of the Supreme Court of Natal, in a suit in which the appellant was the defendant. The suit was brought against him in his capacity, as described in the writ, as Her Majesty's Deputy Commissary-General for the Colony of Natal, and, as such, representing Her Majesty's Commissariat Department. In the declaration he is described as Deputy Commissary-General in his capacity as Acting Commissary-General.

The suit was brought, as alleged in the writ, to recover,—

First, the sum of £743 18s. 10½d. sterling, for the price or hire of certain wagons and oxen, and for carriage of certain goods.

Second, the sum of £1,000 sterling, as and for damages, and as *being the value of fifty trek oxen killed or [62] dead owing to the over-driving and illegal acts of defendant or his employees.

Third, the sum of £456 sterling as hire for certain six wagons and oxen, or as damages for their illegal seizure and impressment by defendant or his employees; and,

Fourth, the sum of £250 sterling as general damages.

All upon grounds to be fully set forth in the declaration.

The grounds of the claim were more fully stated in the declaration, in which it was alleged that the first item of £743 18s. 10½d. was due for the hire of certain wagons under a tender made by the plaintiff, and accepted by the defendant in his capacity as Acting Commissary-General, for seven wagons for the purpose of conveying Government stores, goods, packages of military stores, and other supplies from Pietermaritzburg to Dundee or Doornberg, and

⁽¹⁾ 3 Menzies, 566.

⁽²⁾ 5 P. D., 197.

⁽³⁾ 3 Brod. & B., 275.

⁽⁴⁾ 5 App. Cas., 409.

⁽⁵⁾ 6 B. & S., 257; 85 L. J. (Q.B.), 200.

for the conveyance of certain extra or surplus goods, servants, and invalids as passengers in the said wagons. The other items were claimed as damages alleged to have been sustained by the plaintiff in consequence of certain illegal and tortious acts committed by the defendant and his employes, and for compensation alleged to be due under a promise made by Major-General Marshall, commanding the cavalry brigade, and the senior officer in the vicinity. The plaintiff admitted by his declaration that the defendant had tendered the sum of £1,053 18s. 10d., in lieu of all claims, the sum of £743 18s. 10½d. being for the freight, and £310 for the rest of the plaintiff's claim.

The defendant, without answering the plaintiff's declaration or entering into the merits of the case, excepted to the jurisdiction of the court on the ground that the action was not cognizable by the court, as being an action against Her Majesty's Commissariat Department for acts alleged to be done by officers in Her Majesty's service in performance of their duties in that service, and also upon the ground that the acts complained of were acts for which the court could afford no remedy; and he also excepted to the declaration on the grounds that the defendant, in the capacity in which he was sued, was an officer in Her Majesty's service acting under the instructions and directions of the Commander of the forces in South Africa, and, through him, subject to the instructions and directions of the Secretary of State for War, and that *the negligence and acts complained of, and the claims made under the alleged contract were acts and claims for which no legal remedy existed against Her Majesty's Commissariat Department, even if proceedings had been adopted in England by way of petition of right in due legal form instituted in the Supreme Court of Judicature in England, until the Secretary of State for War, as representing the said department of Her Majesty's Government, had had an opportunity of inquiring into and determining the merits of said claims and alleged wrongs complained of, and the relief, if any, which should be afforded, and of submitting the petition and his recommendations thereon to Her Majesty the Queen for Her Majesty's gracious consideration, and in order that Her Majesty, if she should think fit, might grant her fiat that right be done.

The defendant also excepted to so much of the declaration as claimed damages for negligence, detention, or otherwise on the ground that such claims were bad in law and substance. And on the following grounds, viz.:

1. "That they are preferred against a department of Her Majesty's imperial service for alleged tortious acts of officers acting in the discharge of their duty, and when employed in the service of that department;

2. "That even if a claim for damages as instituted in the action were preferred in England on a petition of right, and submitted for the decision of the Supreme Court of Judicature in England, such claim would be disallowed."

The court overruled the exceptions to the jurisdiction of the court, and also those to the declaration, so far as it related to the form of suing and to the claims in respect of contract, whether made by the Commissariat Department or arising impliedly by reason of Major-General Marshall's orders or request; but they allowed the exceptions to the declaration so far as related to the damages in respect of *delicta* or tortious acts of any of the officers of the Queen's government.

In delivering his judgment, the learned Chief Justice said :

"Her Majesty is not sued by name or title in this action, nor is she so sued in substance, any more than if the action were against the colonial revenue. A public officer under Her Majesty *(as public officers generally are) is sued [623 in his official capacity on a contract in that capacity; and it appears to me that by the law or practice of this forum he may be so sued in ordinary course. It may be quite another matter whether he is liable on an implied contract, by reason of Major-General Marshall's order or request; but, possibly, evidence may show that he is. As far, therefore, as by the exceptions it is objected that there is no jurisdiction in this court to entertain the action, or that the declaration avers no regularly instituted cause of action, they must, I think, be overruled.

"But just as I am of opinion that the practice of our court is to be applied to maintain this action, as far as relates to the form of suing, and to the suits being in respect of contract, so I also think, in accordance with the previous decisions by this court (*Muirhead & Co. v. Ayliff*, 23d of November, 1875, acted on in an Estcourt bridge case in 1879), that the revenue (be it Natal or English) is not liable for the alleged *delicta*, or, in English law phrase, the tortious acts of officers of the Queen's government. I can draw no distinction between one Queen's government and another in that respect: *Rogers v. Ragendro Dutt* (')." "

It is unnecessary to determine whether the court would

(¹) 13 Moo. P. C., 209.

have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done. The suit was not a petition of right, and there was no order of Her Majesty that right should be done.

If the action had been against the Crown, either by name or title, or in substance, it is clear that the court would have had no jurisdiction to entertain it.

The jurisdiction conferred upon the court by the ordinance of Natal, dated the 17th of July, 1857, was merely "over all Her Majesty's subjects, and all other persons whomsoever residing and being within the colony."

The action is against a subject in his official character as Deputy Commissary-General. And it is further stated in the declaration that "the defendant in his aforesaid capacity is the representative or head of the commissariat department [624] in the colony, and as such represents Her Majesty's Imperial Government in the colony, so far as the commissariat and transport departments of the Imperial Government are concerned."

It is clear that the exceptions to the declaration ought to have been allowed upon the ground that the facts stated did not constitute a cause of action against the defendant. It has never been contended by any one that the defendant was personally liable upon the contract. If it had been, that contention must have failed.

The Supreme Court held that he was liable in his official character. It treated the action as a proceeding against the imperial revenue by making a public officer a defendant in his official capacity, and expressed an opinion that a decree in such a suit might be executed against some portion at least of the revenue or property of the Imperial Government.

The Chief Justice said :

"It is a common practice with us in South African courts that actions for obtaining from the revenue money for or in respect of contracts are instituted against the proper public officer (generally the colonial secretary) in his official capacity, and judgment against him in that capacity is both sought and at times given. And in principle it seems to me that it has to be the same, as to our mode of procedure, whether the revenue sought by the action to be charged be colonial or English. The colonies are as much part of the Queen's dominions as England is, and for us to hold, as is contended for on the part of the defendant, that to sue here the English revenue is to sue the sovereign, but to sue colonial revenue is not, would be, I apprehend, to introduce a dis-

inction practically and theoretically constitutionally unsound. I may mention here that our practice of proceeding against the revenue by making a public officer a defendant in his official capacity was, *quoad* the Cape Colony, recognized apparently by the Privy Council as far back as the year 1838, in the case of *Van Rooyen v. Reit* (¹), where the Civil Commissioner of Uitenhage (in the Cape Colony) was sued by private individuals in respect of a pecuniary default of his predecessor in office, in respect of moneys received by him from them. . . ."

*In a subsequent part of his judgment, he said: [625

"There is no occasion here to discuss the question as to how any judgment in this action can be put in execution, but I am disposed to think that the general rule is that a judgment obtained against a government officer in his official capacity may, by our practice, be executed against any government property found within this court's jurisdiction, and not allocated by law to some distinct special purpose. We held, I think, several years ago, that certain property of the Durban municipality could not be taken in execution, by reason of its being thus otherwise allocated. There might, too, I presume, be cases in which the public officer sued did not sufficiently represent *in toto* the government for a judgment against him to bind all government property, even though not specially allocated."

The case of *Van Rooyen v. Reit* (¹), cited by the Chief Justice, is no authority in support of the plaintiff's right to sue the Deputy Commissary General. In that case it was held that the government officer who was sued was not liable, and the only right to sue the district secretary and treasurer which was recognized by the Judicial Committee was a right to sue him personally for money which by arrangement between him and Swan, of whom the plaintiffs were the legal representatives, he had received on Swan's account.

In the case under appeal it was said by the Chief Justice, that the Crown is, "as to some branches of revenue, represented by public officers, and that then no petition of right seems to be requisite," and he referred to the case of the Attorney-General's proceeding by information, and to the case of *Dyke v. Elliott* (²), in which the Crown sued in the Admiralty Court, in the name of the Procurator-General, for the condemnation of a vessel for an offence against the Foreign Enlistment Act.

(¹) 2 Moo. P. C., 177.

(²) 8 Moo. P. C. (N.S.), 428.

The Crown, by virtue of its prerogative, has a right to sue by information in the name of the Attorney-General, and also has a right to sue in the Admiralty Court in the name of the Procurator-General, but in the present case the Chief Justice treats the plaintiff as attempting to sue the imperial [626] revenue by making a *public officer a defendant in his official capacity. But this right of the Crown affords no support for the proposition that the government revenue may be reached by a suit against a public officer in his official capacity.

The case of *Kirk v. The Queen* (¹), which is cited by the Chief Justice, is no authority for that proposition. That was a suit by the Attorney-General against a contractor with the Secretary of State for War, praying for an injunction to restrain him from continuing upon land vested in the Secretary of State after notice to quit given under the powers of the contract. It seems to have been intimated that in such a suit the Secretary of State for War should be a party. That is, a party as complainant, not as a defendant.

Their Lordships are clearly of opinion that the Deputy Commissary-General cannot be sued either personally or in his official capacity upon a contract entered into by him on behalf of the Commissariat Department. He is not a corporation, and he has no property or assets in his official capacity which could be seized or attached in execution of a decree against him in that capacity, and it is clear that no portion of the government revenue, whether allocated to a special purpose or not, could be seized in execution under it.

The law upon the subject has been clearly laid down in several cases.

In the case of *Macbeath v. Haldimund* (²), which was an action against the Governor of Quebec for military stores and supplies provided under his orders for the garrison of a fort, Lord Mansfield said, "The only question before the court is, whether the defendant be liable or not in this action. If he be, the plaintiff must recover. If not, no consideration as to the plaintiff's remedy against any other person can induce the court to make him so. There is no color to say that he is liable in his character of Commander-in-Chief. In a late case which was tried before me, where one Savage brought an action against Lord North, as First Lord of the Treasury, in order that he might be reimbursed the expenses which he had incurred in raising a regiment for the service of government, I held that the action did not lie. So in

(¹) Law Rep., 14 Eq., 558.

(²) 1 T. R., 180.

*another case of *Lutterloh* against *Halsey*, which was [627 an action brought against the defendant, who was a commissary, for the supply of forage for the army, and by whom the plaintiff had been employed in that service, the commissary was held not liable. In the present case it was notorious that the defendant did not *personally* contract. The plaintiff knew, at the time that he furnished the stores, that they were for the use of Government; and he afterwards made Government debtor in his bills.”

In the case of *Gidley v. Lord Palmerston* (') it was held that an action would not lie against the Secretary at War for moneys which he, as a public officer, had received, and which he was authorized to pay over to the plaintiff's testator, on account of his retiring allowance.

In that case Chief Justice Dallas, in delivering the judgment of the court, said, “It is not pretended that the defendant is to be charged in respect of any express undertaking or agreement between him and the testator, or in respect of any other character than his public and official character of Secretary at War. It is in that character and in that only that his duty is alleged to arise, being therefore a duty as between him and the Crown only, and not resulting from any relation to or employment by the plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the Crown, subject only to the disposition or control of the defendant as the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty so committed. There is therefore no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the Crown, being received as the money of the Crown, and the party receiving it being responsible only to the Crown in his public character. On this view of the case it appears to us that this action cannot be maintained.”

Any funds which may be issued by Government to the Commissariat Department for the service of the State stand upon the same footing as that above described with reference to the money received by the Secretary at War.

*With reference to the remark of the Chief Justice [628 that the case could be disposed of by having regard to the practice of the court, the forum of the *locus contractus* and of the action; their Lordships think it right to say that no

(') 8 Brod. & B., 285.

practice of the court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted.

For the above reasons their Lordships are of opinion that the exceptions to the whole declaration ought to have been allowed, and judgment given for the defendant, with costs, and they will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the Supreme Court, and to order judgment to be entered for the defendant with costs. The respondent must pay the costs of this appeal.

Solicitor for the appellant: *Solicitor to the Treasury.*

See 33 Eng. Rep., 286 note.

Where a party to a contract has looked to the anticipated realization of funds by the projectors of a particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to that fund, and he cannot enforce payment from individuals; if the project miscarries and funds are not realized, he has no claim upon anybody for anything. But the intention of the party on the one hand, not to hold the other personally liable, and, of the latter, to limit his liability to some contingency, so that a cause of action will not arise until it has happened, should be clearly manifested by the contract, the general rule being that the law implies a promise to pay for services rendered: *Harkinson v. Dry*, etc., 6 Col., 269.

An agent, holding himself out as a principal, incurs liability to the same extent as if he was principal: *Montgomery v. Montgomery*, 2 Hawaiian R., 677.

A party entering into a contract in his own name may sue or be sued upon it, whether he be in fact agent or principal: *Davis v. Harness*, 38 Ohio St. R., 397.

Where an agent selling goods for his principal orally warrants their quality for *himself*, and as agent procures the making of a contract in writing, containing a warranty of his principal, the former warranty is not merged in the latter, but is a separate contract, binding the agent personally, and in an action on one of the notes given in payment, of the articles sold, payable to the agent, evidence of the oral war-

ranty is admissible: *Shordan v. Kyler*, 87 Ind., 88.

Upon a negotiable promissory note, made by an agent in his own name and not disclosing on its face the name of the principal, no action lies against the principal: *Cragin v. Lovell*, 109 U. S., 194, 198 and cases cited, distinguishing *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326; *Metcalf v. Williams*, 104 U. S., 93; *Hitchcock v. Buchanan*, 105 id., 416.

The character of the liability of the drawer of a bill of exchange must be determined from the instrument itself; and the addition of the word "agent" to his name, without anything else on the instrument indicating his principal, does not relieve him from personal responsibility as drawer of the bill: *Bank v. Cook*, 38 Ohio St. R., 442.

In an action brought against the drawer of a bill of exchange, which was drawn in New York upon persons residing and carrying on business in Liverpool. It was drawn to the order of and indorsed by the drawer. Upon the trial the defendant sought to prove that in drawing the bill he acted as the agent of the drawees, and that the plaintiffs had notice of the fact when they received it. Held, that as there was nothing upon the face of the bill or in the signature of the drawer to show that he only intended to become a party to the bill in his capacity of agent, the evidence was properly rejected: *Phelps v. Borland*, 30 Hun, 362.

In an action on a promissory note which recited, "For value received we promise to pay S. A. Rendell or order," etc., and was signed by four individuals,

and following the signature were the words "president and directors of Prospect and Stockton Cheese Company," held, that there was nothing in the body of the note nor attached to the signatures to show that the promise was made for and on behalf of any person other than the signers; and that evidence to show that it was the promise of the cheese company and not of the individual signers, was not admissible: *Rendell v. Harriman*, 75 Maine, 497, approving *Sturdivant v. Hull*, 59 id., 172.

A contract was expressed to be made between "D. of the city of Toronto, of the first part, and H., Superintendent, of the city of Winnipeg, Manitoba, of the second part." It goes on to say: "The said party of the first part, in consideration of the agreement of the said party of the second part hereinafter contained, hereby agrees to build, construct and set up complete in the city of Winnipeg, gas plant of wrought and cast iron for a gas works there, as follows." Then, after a detailed statement of the articles to be supplied, "In consideration of the agreement herein set forth and stipulated to be performed by the party of the first part, the said party of the second part agrees to pay to the said party of the first part the full sum of \$12,500 for such iron gas plant, as hereinbefore described, to be paid as follows," and then the time and mode of payment are set out.

H. appended to his signature the words: "Superintendent for Building Gas Works at Winnipeg for W. Merrick, of Oswego, N. Y., and others."

Held, that H. was personally liable upon the contract: *Doig v. Holley*, 1 Manitoba Law Reports, 61.

Where a judgment stands in the name of one person as executor of a certain estate, the words "as executor," etc., as used in the judgment, may be considered as a mere *descriptio personae*, and a co-executor of the judgment creditor, will have no power to satisfy such judgment: *Melcher v. Harding*, 17 N. Y. Weekly Dig., 368, 30 Hun, 382, mem.

In *Westcott v. Smally* (1 *Caabae & Ellis*, 124), *Collingridge*, the drawer, had written his name on the back of the bill. The defence was that at the

time the drawer's name was written on the back, and the bill handed over to plaintiff, it was arranged between plaintiff and the drawer, that the latter should not be in any way liable on the bill. *Watkins Williams, J.*, charged the jury, "Did *Collingridge* indorse the bill to plaintiff? As a matter of fact he wrote his name on the back; but you must consider whether, by the arrangement, *Collingridge* was to be liable; if he was not, but his putting his name on the back was mere machinery, to enable the money to be raised, you must find a verdict for defendant."

Where executors agreed, partially in excess of their authority, to sell their testator's land, held, that the agreement was void as against the estate; but as between themselves and the vendee the executors were personally bound, so far as the terms of the agreement were in excess of their authority: *Bostwick v. Beach*, 18 N. Y. Weekly Dig., 435, 31 Hun, 843.

Where an authorized agent executes a contract under seal, in which he represents himself as agent and discloses his principal, and by the terms of which he assumes to contract for the principal only, in the absence of any personal promise or covenant on his part, the contract cannot be held to be his contract, and he cannot be made individually liable thereon, although it is signed only in his individual name: *Whitford v. Laidler*, 94 N. Y., 145, reversing 25 Hun, 136, distinguishing *Kiersted v. O.* and *A. R. R.*, 69 N. Y., 345, *Briggs v. Partridge* 64 N. Y., 357, *Taft v. Brester*, 9 Johns. 384, *Stone v. Wood*, 7 Cow., 458, *Guyon v. Lewis*, 7 Wend., 26.

An agreement in writing between "W., superintendent of the Keets Mining Co., parties of the first part, and P., party of second part," by which "the said parties of the first part" agree to deliver at P.'s mill, ore from the Keets mine (owned by the company) to be crushed and milled by P.; and signed by "W., Supt. Keets Mining Co.," is the contract of the company: *Post v. Pearson*, 108 U. S., 418, citing *Whitney v. Wyman*, 101 id., 392, *Goodenough v. Thayer*, 132 Mass., 152.

If an order for goods is addressed to a corporation, and is accepted by "A. B., Treasurer," he being in fact the

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treasurer of the corporation, the acceptance is in form that of the corporation: *Rogers v. Union, etc.*, 134 Mass., 81, distinguishing same case as presented on former appeal, 130 Mass., 584.

A party who pays the consideration of a contract is *prima facie* the party beneficially interested therein, and may maintain an action thereon, although the contract be taken in the name of another party: *Tracy v. Gunn*, 29 Kans., 508.

Where a landlord, with the consent of his tenants, sold their share of a crop of corn with his own, and afterward brought an action against the purchaser for not accepting the corn, the fact that the landlord did not own all the corn, neither constitutes a defence nor operates to diminish the damage. If the acceptance of the corn by the purchaser would have invested him with a good title, it is not material whether the landlord owned all the corn or not: *Davis v. Harness*, 38 Ohio St. R., 397.

Where a contract is made by an agent, without disclosing his principal, and the other contracting party afterwards discovers the principal, he may waive his right to look to the agent and resort to the principal. In such case parol evidence is admissible to show who the principal was, even when the contract is in writing: *Borcherling v. Katz*, 37 N. J. Eq., 150.

The rule that an unnamed and unknown principal shall stand liable for the contract of his agent, does not apply to a demise under seal. The relation between the owner of land and those who occupy it is of a purely legal character; and the fact that a lessee takes a lease for an unnamed principal, but in his own name, will not render the unnamed principal liable

for the rent: *Borcherling v. Katz*, 37 N. J. Eq., 150, 151 note.

But see, *in equity*, 37 N. J. Eq., 151 note.

A public officer, acting in his official capacity as agent for the government, is not personally liable on contracts negotiated by him within the line of his public duties: *Richardson v. Harding*, 2 Hawaiian R., 433, citing *Struckfield v. Little*, 1 Maine, 231.

That a sovereign or commonwealth cannot be sued in its own courts, see 33 Eng. Rep., 655 note; *Cunningham v. Macon, etc.*, 109 U. S., 446; *N. H. v. Louisiana*, 108 id., 76; *State v. Shiveley*, 10 Oregon, 267.

See *Louisiana v. Jumel*, 107 U. S., 711, as explained 109 id., 466; *Clark v. Barnard*, 108 id., 436, distinguishing *Georgia v. Jessup*, 106 id., 458.

When the state authorizes a citizen by joint resolution to bring suit against her on certain stipulations and for a particular cause of action therein specified, the courts are restricted by those stipulations to that cause of action, and are not empowered to consider any broader equities which may exist between the parties, or the law which might apply to a different cause of action: *Thweatt v. State*, 66 Geo., 673.

Under the statutes of Massachusetts, an action may be maintained against the manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, for an injury to property caused by the defective construction of the railroad, under such circumstances that an action could have been maintained had the road been owned by a corporation and not by the Commonwealth, although the defective construction was the act of a former manager: *Amsteen v. Gardner*, 134 Mass., 4.

[6 Appeal Cases, 628.]

J.C.*, May 19, 20, 1881.

[PRIVY COUNCIL.]

WILLIAM BLACKBURN, *Plaintiff*; and JOHN FLAVELLE,
Defendant.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Crown Lands Alienation Act, 1861, s. 13—Lands forfeited to the Crown cannot be conditionally sold.

Lands taken under a conditional sale and afterwards forfeited to the Crown are not open to a conditional purchase under sect. 13 of the Crown Lands Alienation Act, 1861. The Crown has, under the 18th section, the option either to sell them by public auction or to retain them in its own hands.

**Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR JOHN MELLOR.

[6 Appeal Cases, 636.]

J.C.*, May 20, 21, 1881.

[PRIVY COUNCIL.]

*GEORGE NAPIER TURNER, *Plaintiff*; and WILLIAM WALSH, *Defendant*. [636]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Dedication of Land to Public Purposes by the Crown—Presumption from User—Crown Lands Alienation Act, 1861, ss. 3, 5—5 & 6 Vict. c. 36.

From long-continued user of a way by the public, whether land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption may and ought to be presumed.

The same presumption from user should be made in the case of Crown lands in the colony of New South Wales, apart from the Crown Lands Alienation Act, 1861, though the nature of the user and the weight to be given to it vary in each particular case.

Assuming that the effect of the 3d and 5th sections of the act is that any dedication by the Crown must since 1861 be in manner prescribed by the statute:

Held, that from a continuous user of twenty-one years before the statute, continued since 1861 down to the time of the action without any interruption or interference on the part of the Crown, a dedication prior to the statute, and at a time when the Crown had power to dedicate, might be presumed; and that that presumption was strengthened by the subsequent user.

5 & 6 Vict. c. 36, of the Imperial Parliament leaves the power of the Crown with regard to public roads as it existed by the common law, and does not interfere with its right to dedicate lands for that purpose.

** Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR JOHN MELLOR.

APPEAL from a judgment of the Supreme Court (March 22, 1880) discharging with costs a rule *nisi* obtained by the appellant calling on the respondent to show cause why the verdict in his favor should not be set aside, and a new trial had upon the ground of misdirection.

The question of law involved was, whether user may be relied on in the colony of New South Wales in like manner [637] as it may be *in England, for the purpose of establishing as against the Crown a presumption of a dedication of a road over Crown lands.

The declaration alleged that the respondent broke and entered the appellant's land and cut down the fences on the land.

The material plea was one which justified the trespasses on the ground that there was a highway across the appellant's land, that the fences obstructed the highway, and that the respondent passed along the highway and cut down the fences to remove the obstruction.

To this plea the appellant pleaded two replications, each of which stated that the alleged highway was a track across the plaintiff's land, while the same was Crown land, and that such track was used by persons travelling with stock, for travelling and driving their stock on and along the same, but that such track was never proclaimed or dedicated as a highway, and was never a way otherwise than as aforesaid.

Issue was joined on these replications, and the action was tried by Mr. Justice Hargrave and a jury.

On the part of the appellant evidence was given of the alleged trespasses by the respondent, and a Crown grant to the appellant of the land, dated the 1st of February, 1879, was put in. This Crown grant did not contain any reservation or exception of the alleged highway.

On the part of the respondent "clear and distinct evidence of an uninterrupted and continuous user of the road in question" was given. It was shown, according to Hargrave, J., that "for upwards of forty years the road fenced across by the plaintiff had been constantly used by the public, by the police, by mail coaches, and by travellers in going up or down the Lachlan between Enabalong and Condobolin, and to numerous places, and that there was such a road to the knowledge of the Crown was amply proved by the production in evidence of the county map, which came out of the possession of the Crown, in which the road, though only specified as a track, was marked out."

Mr. Justice Hargrave directed the jury that user might be relied on in New South Wales as it might in England for

the purpose of presuming and establishing dedication of a road over Crown lands as against the Crown, and that the user proved was sufficient to *entitle the jury to pre- [638
sume dedication by the Crown of the road in question.

The jury found a verdict for the respondent.

The appellant obtained a rule *nisi* for a new trial, on the ground of misdirection; which the Supreme Court discharged with costs.

The judges held, first, that the 2d and 3d sections of the act 5 & 6 Vict. c. 36, did not bear on the question, as they related to alienations, whereas the acquiring of a right of way by user did not involve any alienation by the Crown; secondly, that the 3d and 5th sections of the Crown Lands Alienation Act of 1861 "regulated only the active rights of the Crown, and did not touch the question of matters in respect of which the Crown was passive, and where rights were claimed by reason of the acts of others as against the Crown;" thirdly, that the right of way had been acquired, or at all events was in course of being acquired before the Crown Lands Alienation Act of 1861 was passed, and that that act did not operate to divest a right already acquired, or to prevent the maturing of a right in course of being acquired.

Mr. *Wills*, Q.C., and Mr. *William Wills*, for the appellant, contended that this view was wrong, and that the direction of Hargrave, J., was erroneous. The Crown Lands Alienation Act of 1861 (25 Vict. No. 1), ss. 3, 4, 5, 6, define the only method in which, since 1861, public highways over Crown lands can be created. They expressly exclude the application of the common law doctrine of dedication from user. The ordinary doctrine of dedication as established in an old country like England cannot be safely laid down without qualification as a guide to a New South Wales jury with respect to waste lands of the Crown. The attention of the jury was never called to the very different character of the user before and after 1861. Besides, a user by the police and mail coaches is not sufficient to support a presumption of dedication against the Crown; and a wholly insufficient user before 1861 could not be supplemented afterwards. Nor can the Crown be presumed to know either by itself or its officials the use that is being made of the land. Besides, the land was under lease, and the lessee was in possession, and not the Crown or its servants. Reference was *made to 5 & 6 Vict. c. 36, as also limiting the [639
power of the Crown to dedicate.

Mr. *Holl*, Q.C., and Mr. *J. D. Wood*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH: This appeal arises in an action brought by the appellant against the respondent for a trespass on a plot of land purchased from the Crown under the provisions of the Crown Lands Alienation Act, 1861, of the statutes of New South Wales. He complained that the defendant had entered the land, and pulled down some fences. The defendant pleaded that there was a public highway over the plot of land, and justified his acts in the proper use of that highway. The question in the action is whether or not the defendant has proved that such a highway existed. The land before the grant, which is of the date of the 1st of February, 1879, belonged to the Crown. There was a suggestion that it had been leased for pastoral purposes, but there is no proof that any such lease had been made.

The evidence, though stated rather shortly by the learned judge, Mr. Justice Hargrave, who tried the cause, is clear and explicit. It appears that for forty years before the commencement of the action there had been a road over and across the piece of land granted to the plaintiff, which had been used by the public with carriages, horses, and cattle, and on foot. It appears to have been the main road between Enabalong and Condobolin. The mail coaches travelled that road; teamsters conveying the produce of the country, especially wool, used it; and, in fact, it had been used by the public for all purposes, during this period, continuously and without interruption. Upon such evidence the judge would be right, unless some positive restriction on the power of the Crown appeared, in directing the jury that they might presume a dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued 640] user *of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may and indeed ought to be presumed.

The jury found for the defendant, whereupon an application was made to the court by the plaintiff for a new trial, not on the ground that the verdict was against the evidence, but on the ground that the judge had misdirected the jury. We have not the terms in which the learned judge addressed the jury, and can only obtain information of what he said from his own judgment in discharging the rule, and from

the grounds stated in the rule *nisi* for a new trial. The plaintiff is, of course, confined to these grounds. They are —“That his honor ruled that user in this colony may be relied on, in like manner as it may in England, for the purpose of presuming and establishing dedication of a road over Crown lands as against the Crown; and that the user proved in this case was sufficient to entitle the jury to presume dedication by the Crown of the road in question.” The plaintiff does not complain in the first of these grounds that, supposing the same evidence had been given in England, the direction would not have been right; but he complains of the ruling of the judge that user may be relied on in the colony, in the same manner as it may be in England, for the purpose of raising the presumption of dedication of a road over Crown lands. Their Lordships are not aware of any reason in point of law why the same presumption from user should not be made in the case of Crown lands in the colony as would be made in England, apart from the statute to which attention will be presently called; though the nature of the user, and the weight to be given to it, may of course vary in each particular case.

The main contention of the appellant was, that the Crown Lands Alienation Act has placed restrictions on the power of the Crown to dedicate roads in the colony, and that the effect of that act was not sufficiently regarded by the judge in his direction to the jury. The act was passed in the year 1861, and the 3d section enacts this: “Any Crown lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this act, but not otherwise.” Then the 5th *section en- [64] acts: “The Governor, with the advice aforesaid, may, by notice in the *Gazette*, reserve or dedicate, in such manner as may seem best for the public interest, any Crown lands for any railway or railway station, any public road, canal, or other internal communication.” It is said that, taking these two provisions together, any dedication by the Crown since 1861 must be in the manner prescribed, that is, by the Governor, by notice in the *Gazette*, and not otherwise. Assuming that to be the effect of the statute, the evidence in this case, as has been stated, showed a continuous user of the road for forty years, which gives (the case being tried in 1880) a user of twenty-one years before the statute of 1861 came into operation, and during the time when the Crown held these lands in full right, *jure coronæ*, with full power to dedicate. Their Lordships have no difficulty in saying that the judge was right in directing the jury that from the user of

twenty-one years before the statute, continued since 1861 down to the time of the action without any interruption or interference on the part of the Crown, they might presume a dedication prior to the statute, and at a time when the Crown had power to dedicate. A further objection was that the judge did not point out to the jury that the evidence of user after 1861 was of different and less weight than that of the previous user; but if there is any difference, the evidence of continuance and unbroken user since 1861 is stronger to raise a presumption of an old dedication than the earlier evidence, because, if there had not been an old dedication prior to the passing of the act of 1861, the officers of the Crown might reasonably have been expected to stop the unauthorized use of the land by the public, and to put down acts which would have been, upon the hypothesis of the appellant, a series of trespasses.

Their Lordships think it right to observe that one of the learned judges, Sir William Manning, is scarcely correct in the way in which he regards the evidence. He says: "There was then a further difficulty. It was, his honor took it, plain that before 1861 (the date of the Crown Lands Alienation Act) the right by user was at least inchoate; did it follow then, that the user, then enjoyed for twenty-one 642] years, would be put an end to by that act? *Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this act?" This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses. It may be that in this case the evidence of user prior to 1861 was alone sufficient to establish the presumption of dedication; but the strength of that presumption is increased by the subsequent user, and would certainly have been much diminished if the user had been discontinued after 1861. In this case their Lordships have no doubt that, the user being contin-

uous, the direction is right, and if the direction is right, it is not contended that the verdict is wrong.

There are two cases where the principles which govern this case have been recognized: *The Queen v. The Inhabitants of East Mark* (*), and *The Queen v. Petrie* (*). It may be observed that in the present case the evidence is very much stronger, to raise the presumption of a dedication at the time when the Crown was competent to dedicate, than the evidence which was held sufficient to establish such a presumption by some possible owner of the fee in *The Queen v. Petrie* (*). In that case, after seven years' user without interruption of the road in question, the court held that the judge was right in directing the jury that they might from that user presume a dedication from an owner of the fee; though it was not proved that during that time there was any one who was absolute owner of the fee, but it being possible that such an owner then existed.

*There is only one other point which need be ad- [643
verted to. The learned counsel for the appellant referred to the act 5 & 6 Vict. c. 36, of the Imperial Parliament, as in some way limiting the power of the Crown to dedicate roads. Their Lordships, on looking at that act, find no such restriction in it. The 2d section enacts: "That the waste lands of the Crown in the Australian colonies shall not, save as hereinafter is excepted, be conveyed or alienated by Her Majesty." The 3d section is: "Provided always, and be it enacted, that nothing in this act contained shall extend or be construed to extend to prevent Her Majesty or any person or persons acting on the behalf or under the authority of Her Majesty from excepting from sale, and either reserving to Her Majesty, her heirs and successors, or disposing of in such other manner as for the public interests may seem best, such lands as may be required for public roads or other internal communications." These enactments leave Her Majesty's power with regard to public roads as it existed by the common law, and do not interfere with her right to dedicate lands for this purpose.

Their Lordships think that this appeal fails; and they will, therefore, humbly advise Her Majesty to affirm the judgment of the Supreme Court of New South Wales, with costs.

Solicitors for the appellant: *Burton, Yeates, Hart & Burton.*

Solicitors for the respondent: *H. Kimber & Co.*

(*) 11 Q. B., 877.

(*) 4 E. & B., 737.

See 3 Monthly Western Jur., 641; 2 Abb. N. C., 400; Derby v. Alling, 40 Conn., 410, deciding many points.

Dedication is the act of appropriating property to public or pious uses, in such a manner as to conclude the owner. To constitute a valid dedication of an easement, no deed or writing is necessary; neither is there any particular form or ceremony to be observed. It requires the assent of the owner to the use or easement.

Canada, Upper: Att'y-Gen. v. Boulton, 21 Grant, 598; Toronto v. McGill, 7 id., 463; Att'y-Gen. v. Toronto, 10 id., 436; Belford v. Haynes, 7 U. C. Q. B., 464; Guelph v. Canada, etc., 4 Grant's Chy., 632.

But see Dunlop v. York, 16 Grant, 216.

Colorado: Ward v. Farwell, 6 Col., 66.

Connecticut: Derby v. Alling, 40 Conn., 410.

Indiana: Sullivan v. State, 53 Ind., 309; Green v. Elliot, 86 id., 53.

Iowa: Yost v. Leonard, 34 Iowa, 9; McDonnor v. Des Moines, Id., 487; State v. Green, 41 id., 693.

Mississippi: Briel v. Natches, 48 Miss., 423.

New Jersey: Trustees v. Hoboken, 33 N. J. Law, 13; Earle v. New Brunswick, 38 id., 47.

New York: Cook v. Harris, 61 N. Y., 448; Strong v. Brooklyn, 68 id., 1; Kelsey v. King, 33 How. Pr., 9, affirming 32 Barb., 410, 11 Abb. Pr., 180; Gould v. Glass, 19 Barb., 193-4; Hunter v. Trustees, 6 Hill, 407.

Oregon: Carter v. Portland, 4 Oregon, 339.

United States, Circuit and District: Robertson v. Wellsville, 1 Bond, 81; Rueh v. Rock Island, 5 Bissell, 95, 98 n.

Wisconsin: Barkan v. West, 23 Wisc., 416.

A dedication in fact, of land to the public use, must be the free and voluntary act of the owner, with intent to so dedicate, otherwise no right enures to the public: Gould v. Glass, 19 Barb., 179.

Dedication can only be by the owner of the fee: a life tenant cannot dedicate as against the remainderman: Fitz Gibbon v. Toronto, 25 U. C. Q. B., 137; Detroit v. Detroit, etc., 23 Mich.,

173; Kyle v. Logan, 87 Ill., 64; Cyr v. Madore, 73 Maine, 53.

As against a mortgagee: Hayne v. West Hoboken, 35 N. J. Eq., 354.

There must be not only an intention to dedicate, but an act manifesting such intention, though it may be established by circumstances: Robertson v. Wellsville, 1 Bond, 81; Cook v. Harris, 61 N. Y., 448; Niagara, etc., v. Bachman, 66 id., 261; Strong v. Brooklyn, 68 id., 1; Grinnell v. Kirtland, 2 Abb. N. C., 386, 6 Daly, 356; Belford v. Haynes, 7 U. C. Q. B., 464; Illinois, etc., v. Littlefield, 67 Ill., 368; Kyle v. Logan, 87 id., 64; Carter v. Portland, 4 Oregon, 339.

So as acceptance: Briel v. Natches, 48 Miss., 423; State v. Elizabeth, 37 N. J. L., 432; Madison v. Booth, 53 Geo., 609.

If a party is and has been for many years in the occupation of a piece of land, and the authorities claim that it has been dedicated as a public street, and that his buildings thereon are a public nuisance, it devolves on them to show affirmatively that it has been thus dedicated: Tate v. Sacramento, 50 Cal., 243.

Merely permitting land to lie open, unfenced against intrusion or without claim made to a right of private exclusive possession, does not evince an intent to dedicate the same to public use or as a public way: Strong v. Brooklyn, 68 N. Y., 1; Grinnell v. Kirtland, 2 Abb. N. C., 386, 6 Daly, 356.

Silent acquiescence in the use of a way by the public across his lands, even for several years, is not of itself sufficient to establish a dedication by the owner: Cyr v. Madore, 73 Maine, 53; Grinnell v. Kirtland, 2 Abb. N. C., 386, 6 Daly, 356.

The intention of the owners at the time of the dedication, not at any subsequent time, is to be considered: Rueh v. Rock Island, 5 Bissell, 95.

The maintenance of gates and bars across a travelled way indicates an absence of intention to dedicate the way to public use: State v. Green, 41 Iowa, 693; Cyr v. Madore, 73 Maine, 53.

The maintenance of a fence with bars or gates across the way by the owner of the land, at any time, is evidence negating his intention to dedicate. The

naked fact that the owner has suffered the way to remain open for a few years without maintaining such fence, will not of itself prove a change of intention: *Cyr v. Madore*, 78 Maine, 58.

Words purporting to grant a strip of land to a city inserted in a deed to a third person of lots adjoining such strip, while of no effect as a conveyance to the city, may be evidence of the grantor's intent to dedicate such strip to the public: *Trevise v. Barteau*, 54 Wisc., 99.

On the question whether a certain strip of land in a city is a public alley, evidence is admissible to show that such strip has been taxed by the city ever since its organization; that it has been sold by the county, with other lands, for taxes, and deeds given on such sales; that it appeared as an alley on none of the authorized maps of the city; that the city has never authorized or accepted the dedication; that the strip has never been used by the public, but only by the adjoining lot owners; and that plaintiff went into possession of it more than ten years before the action, and fenced it in with her adjoining lot, has cultivated and built upon it, and has paid taxes upon it every year for about ten years, except when it was sold for taxes; such evidence tending strongly to show both a non-acceptance of the alleged dedication, and a title in plaintiff by adverse possession: *Trevise v. Barteau*, 54 Wisc., 99, distinguishing *Lemon v. Hayden*, 18 Wisc., 160.

User alone is sufficient to establish a dedication of land to public use; but if there be no other evidence of the fact, it must have continued for twenty years: *Gould v. Glass*, 19 Barb., 179; *Hunter v. Trustees*, 6 Hill, 407; *Shugart v. Halliday*, 2 Bradw., 45; *Hiner v. Jeapert*, 65 Ills., 428; *State v. Green*, 41 Iowa, 693; *Gerberling v. Wunnenberg*, 51 id., 125; *Briel v. Natches*, 48 Miss., 423; *Mowry v. Providence*, 10 R. I., 52.

But see *Hoadley v. San Francisco*, 50 Cal., 265; *Hiner v. Jeapert*, 65 Ills., 428; *Kyle v. Logan*, 87 id., 25; *Cyr v. Madore*, 78 Maine, 58; *Grinnell v. Kirtland*, 2 Abb. N. C., 886, 6 Daly, 356.

If a lot on which there is a spring of water, in the plan of a town, be reserved for public use by the founder of the town, who owned the land on

which the town is laid out, such reservation, though it may amount to a dedication of the lot for the public use, by the owner, does not vest the legal title thereto in the county or supervisors of the county, or necessarily vest the county or supervisors thereof with the equitable right to demand a conveyance from such owner or his alienee to the county or the supervisors thereof: *Supervisors v. Ellison*, 8 W. Va., 808.

The extent of the right parted with by the owner and acquired by the public under a dedication, depends upon the purpose for which it was made, and cannot exceed that.

Illinois: *Illinois*, etc., v. Littlefield, 67 Ills., 368; *Jacksonville v. Jacksonville*, etc., id., 540; *Princeville v. Aulen*, 77 id., 325.

Indiana: *Cox v. Louisville*, etc., 48 Ind., 178.

Michigan: *Board*, etc., v. Detroit, 80 Mich., 505.

New Jersey: *Jackson v. Perrine*, 85 N. J. Law, 187.

New York: *Hunter v. Trustees*, 6 Hill, 407; *Kelsey v. King*, 33 How. Pr., 39, affirming 32 Barb., 410, 11 Abb. Pr., 180.

Rhode Island: *Clark v. Providence*, 10 R. I., 437.

Though if dedicated for a particular purpose—i.e. a street—it may be used for all the purposes to which such streets are usually devoted, as the wants or convenience of the people may render necessary or important, such as the construction of sewers, etc.: *Warren v. Grand Haven*, 30 Mich., 24.

Though not a railway: *Kelsey v. King*, 33 How. Pr., 39, affirming 32 Barb., 410, 11 Abb. Pr., 180.

But see in *Illinois*: *C. R. I.*, etc., v. Joliet, 79 Ills., 25.

Or for public buildings: *Princeville v. Aulen*, 77 Ills., 325.

Nor can a railway allow land acquired by it to be used as a public highway: *Strong v. Brooklyn*, 68 N. Y., 1; *Heard v. Brooklyn*, 60 id., 242.

In *Illinois*, a distinction is made between a statutory and a common law dedication, and it is *there* held the legislature may direct what uses shall be made of land dedicated to the public generally: *Chicago*, etc., v. Joliet, 79 Ills., 25.

Where a piece of land is dedicated for

a particular purpose, equity will restrain its use for any other: *Jacksonville v. Jacksonville*, etc., 67 Ills., 540; *Cox v. Louisville*, etc., 48 Ind., 52; *Princeville v. Aulen*, 77 Ills., 325; *Attorney-General v. Goodrich*, 5 Grant's (U.C.) Chy., 402; *Toronto v. York*, etc., 6 id., 525.

Even though more be dedicated than is required for the purpose: *Attorney-General v. Goodrich*, 5 Grant's (U.C.) Chy., 402.

If squares in a city are dedicated to public use, the use does not vest in the city nor in the inhabitants, but in the public: *Hoadley v. San Francisco*, 50 Cal., 265; *Chicago v. Joliet*, 79 Ills., 325.

As between grantor and grantee there may be a valid dedication of a street adjoining lands conveyed, though none as between the grantor and the public: *Bissell v. N. Y. Cent.*, 23 N. Y., 61, reversing 26 Barb., 630; *Perrine v. N. Y. Cent.*, 36 N. Y., 120; *Matter of Fourth Av.*, 11 Abb., 193, 199; *Smylee v. Hastings*, 22 N. Y., 217; *Mayo v. Wood*, 50 Cal., 171; *O'Brien v. Trenton*, 6 U. C. Com. Pl., 350; *Moore v. Esquesing*, 21 id., 277; *Regina v. Spence*, 11 U. C. Q. B., 31; *Guelph v. Canada*, etc., 4 Grant's Chy., 632; *Illinois etc., v. Littlefield*, 67 Ills., 368; *Princeville v. Aulen*, 77 id., 325; *Cox v. Louisville*, etc., 48 Ind., 178; *Fisher v. Beard*, 32 Iowa, 346; *Yost v. Leonard*, 34 id., 9; *McDunn v. Des Moines*, Id., 467; *Fisher v. Beard*, 40 id., 625; *Briel v. Natches*, 48 Miss., 423; *Trustees v. Hoboken*, 33 N. J. L., 13; *State v. Elizabeth*, 37 id., 432; *Stetson v. Bangor*, 60 Maine, 313; *Earle v. New Brunswick*, 38 N. J. L., 47; *Falls v. Reis*, 74 Penn. St. R., 439; *Clark v. Providence*, 10 R. I., 437; *Regina v. Boulton*, 15 U. C. Q. B., 272.

See *Outerbridge v. Phelps*, 18 Abb. N. C., 117; *Leonard v. Leonard*, 2 Allen, 543; *Calligan v. Hobkirk*, 1 Prince Edw. Isl., 127; *Niagara*, etc., v. *Bachman*, 66 N. Y., 261.

Where the proprietors of adjacent lands agreed that each would appropriate from his land a strip to be used in common for a public street, and conveyances and improvements have been made in the faith that the street would be opened, the agreement may be enforced in equity, whether the public authorities accept the street as dedi-

cated to public use or not: *Seegar v. Harrison*, 25 Ohio St. R., 141.

See *Regina v. Spence*, 11 U. C. Q. B., 31.

Where the appropriation is for the use of particular individuals only, and made under circumstances which exclude the presumption that it was intended for the public use, it will not amount to a dedication: *Illinois etc., v. Littlefield*, 67 Ills., 368.

Where adjoining owners of land agree to reserve an alley between their premises for their own use, the fact that the same for years is open to the public use; that in several conveyances it is described as an alley, and that the owner of the soil never paid taxes on the same, will not bring the alley into existence as a public easement: *Illinois etc., v. Littlefield*, 67 Ills., 368.

Where the owner of land lays the same out into lots and streets, makes and files a map or plot thereof, and sells and conveys lots by the map bounded upon the streets as delineated thereon, this does not necessarily, and without other facts, make the streets so laid out *public highways*: *Niagara etc., v. Bachman*, 66 N. Y., 261; *Grinnell v. Kirtland*, 2 Abb. N. C., 386, 6 Daly, 356; *Heard v. Brooklyn*, 60 N. Y., 242.

If the title to land is granted to a city in trust for the use of the public, private persons cannot acquire the right to it by an adverse possession for the period prescribed in the statute of limitations: *Hoadley v. San Francisco*, 50 Cal., 265.

No specific length of time is required to establish the fact of a dedication to the public. There may be sufficient acts of the owner of land and the public within a short time to estop the former from asserting his original dominion over his property and to entitle the latter to its use.

Colorado: *Ward v. Farwell*, 6 Colorado, 66.

Illinois: But see *Kyle v. Logan*, 87 Ills., 64.

Indiana: *Green v. Elliot*, 86 Indiana, 53.

New York: *Carpenter v. Gwynn*, 35 Barb., 395; *Jordan v. Otis*, 37 id., 50.

Dedication may be proven by circum-

stances. If there be evidence of such circumstances, it is a question of fact for the jury.

California: *Hoadley v. San Francisco*, 50 Cal., 265.

Canada, Upper: *Belford v. Haynes*, 7 U. C. Q. B., 464.

Colorado: *Ward v. Farwell*, 6 Col., 66.

Illinois: But see *Kyle v. Logan*, 87 Ills., 64.

Indiana: *Green v. Elliot*, 86 Ind., 53.

Maine: But see *Cyr v. Madore*, 73 Maine, 53.

Mississippi: *Briel v. Natches*, 48 Miss., 423.

New York: *Cook v. Harris*, 61 N. Y., 448; *Gould v. Glass*, 19 Barb., 179; *Hunter v. Trustees*, 6 Hill, 407.

Wisconsin: *Barteau v. West*, 23 Wisc., 416.

The presumption of dedication arising merely from circumstances, may be rebutted.

But acts and declarations by the owner, which are to have the effect of dedication, must be unmistakable in their purpose and decisive in their character: *Niagara, etc., v. Bachman*, 66 N. Y., 261; *Carpenter v. Gwynn*, 35 Barb., 395; *Illinois, etc., v. Littlefield*, 67 Ills., 368; *Kyle v. Logan*, 87 id., 64; *Manson v. State*, 60 Ind., 357; *Grinnell v. Kirtland*, 2 Abb. N. C., 386, 6 Daly, 356.

An intent may, like any other fact, be shown by a preponderance of testimony. An instruction that "such intent to dedicate must be unequivocally and satisfactorily proven," is erroneous, as demanding a much stronger degree of proof than the law requires. Nor will another instruction that "it is incumbent upon the defendants to prove by a preponderance of evidence that there was an intent to dedicate," cure the error of the former instruction: *Shugart v. Halliday*, 2 Bradw., 45.

A dedication once made cannot be recalled.

New York: *Cook v. Harris*, 61 N. Y., 448.

United States, Circuit and District: *Rueh v. Rock Island*, 5 Bissell, 95, 98 note.

The acceptance by the public or donee of the use or easement for the purposes intended. This acceptance must be by formal act of the public au-

thorities, or by common use, showing a clear intent to accept and enjoy the easement for the specific purpose of the proposed dedication: *Mathis v. Parham*, 1 Tenn. Ch., 536, citing *Holdane v. Trustees*, 21 N. Y., 474; *Cincinnati v. White*, 6 Peters, 489.

California: *Hoadley v. San Francisco*, 50 Cal., 265.

Canada, Upper: *Attorney-General v. Boulton*, 21 Grant, 598; *Toronto v. McGill*, 7 id., 462.

Colorado: *Ward v. Farwell*, 6 Colorado, 66.

Connecticut: *Derby v. Ailing*, 40 Conn., 410.

Georgia: *Madison v. Booth*, 53 Geo., 609.

Illinois: *Illinois, etc., v. Littlefield*, 67 Ills., 368.

Indiana: *Manson v. State*, 60 Ind., 357; *Manson v. Haughey*, 60 id., 364; *Sullivan v. State*, 52 id., 309; *Green v. Elliot*, 86 id., 53.

Iowa: *Yost v. Leonard*, 34 Iowa, 9; *McDunn v. Des Moines*, 34 id., 467; *State v. Green*, 41 id., 693.

Michigan: *Field v. Manchester*, 32 Mich., 279.

Mississippi: *Briel v. Natches*, 48 Miss., 423.

New Jersey: *Trustees v. Hoboken*, 33 N. J. Law, 13; *State v. Elizabeth*, 37 id., 432; *Earle v. New Brunswick*, 38 id., 47.

New York: *Niagara, etc., v. Bachman*, 66 N. Y., 261; *Holdane v. Cold Spring*, 21 id., 474, affirming 23 Barb., 103; *Cook v. Harris*, 61 N. Y., 448; *Strong v. Brooklyn*, 68 id., 1; *Gould v. Glass*, 19 Barb., 193-4; *Hunter v. Trustees*, 6 Hill, 407; *Jordan v. Otis*, 37 Barb., 50.

Oregon: *Carter v. Portland*, 4 Oregon, 339.

Tennessee: *Mathis v. Parham*, 1 Tenn. Ch., 533.

United States, Circuit and District: *Robertson v. Wellsville*, 1 Bond, 81; *Rueh v. Rock Island*, 5 Bissell, 95, 98 n. **Wisconsin:** *Barteau v. West*, 23 Wisc., 466.

There cannot be a dedication to a limited portion of the public; and an acceptance by the public is necessary to a valid dedication: *Trevise v. Barteau*, 54 Wisc., 99.

Where the public authorities do not within a reasonable time accept an offer to dedicate, the proprietor may again

1881 Connecticut Mutual Life Insurance Co. of Hartford v. Moore. J.C.

take possession, and revoke his offer :
Field v. Manchester, 32 Mich., 279.

See Derby v. Ailing, 40 Conn., 410.
The rule laid down in Fonda v. Borst (2 Abb. Ct. App. Dec., 155), that a purchaser of a lot designated and laid out on a map, as bounded by a street, is not entitled to have such street opened to the public, until it has been accepted by the public, applies to urban as well as to rural property : Grinnell

v. Kirtland, 2 Abbot's N. C., 386, 6 Daly, 356.

The conversion of a way dedicated to purchasers of adjoining lots into a public way, does not authorize the award of more than nominal damages : Stetson v. Bangor, 60 Maine, 318.

The doctrine of abandonment, or non-user, applies only to *easements* claimed by one in the land of another, and not to the title to the land itself : Robie v. Sedgwick, 35 Barb., 819.

[6 Appeal Cases, 644.]

J.C.*, July 5, 6, 7, 1881.

[PRIVY COUNCIL.]

644] *THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, Defendant; and KATE DOUGLAS MOORE, Plaintiff⁽¹⁾.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Law Reform Act (Ontario)—38 Vict. c. 11 (Canada), s. 212—Jurisdiction of Court of Queen's Bench and Supreme Court—Rule to set aside Verdict—Misdirection—New Trial.

Upon a rule *nisi* calling upon the plaintiff in an action upon a policy of life insurance to show cause why a verdict obtained by her should not be set aside and a new suit or verdict entered for the defendant pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendant; and for misdirection in that the jury had not been directed on the evidence to find for the defendant; the Court of Queen's Bench for Ontario ordered the verdict for the plaintiff to be set aside and the same to be entered for the defendant, while the Supreme Court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence:

Held, that although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the plaintiff and direct a verdict to be entered for the defendant in direct opposition to the finding of the jury on a material issue. Under 38 Vict. c. 11 (Canada), the Supreme Court has power to make any order or to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by sect. 22 in this case, in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.

Although the Privy Council have the right, if they think fit, to order a new trial **645]** on any ground, that power will not be exercised merely where ^{*}the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it.

^{*}*Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) Affirming 6 Can. Sup. Ct., 634, 695.

[6 Appeal Cases, 657.]

H.L. (E.), Aug. 2, 1881.

[HOUSE OF LORDS.]

*SIDNEY FAITHORNE GREEN (Clerk), *Appellant*; [657 and LORD PENZANCE, W. DEAN, W. WARRELL, and J. H. WORRILL, *Respondents* (*).]

Ecclesiastical Law—Chancery Court of York—Contumacy—Writ de contumace capiendo—Mittimus—County Palatine of Lancaster—Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 7, 9, 13—5 Eliz. c. 23, ss. 2, 11—58 Geo. 3, c. 127, s. 1—2 & 3 Will. 4, c. 93, s. 1—Rules of Supreme Court, Order II, rule 8.

A representation having been made against a clerk, rector of a parish within the county palatine of Lancaster, in the province of York, under the Public Worship Act, 1874, for offences against sect. 8 of that act committed in the parish church, the bishop of the diocese sent the matter to the Archbishop of York, who sent a requisition to Lord Penzance—the judge appointed under the act, who had since the passing of the act become official principal of the Chancery Court of York—requiring him to hear and determine the matter of the representation at any place in London or Westminster, or within the province of York or diocese of Manchester, as he might deem fit. The judge heard it at Westminster, and there pronounced judgment, and issued a monition ordering the clerk to abstain from the practices complained of. The clerk having disobeyed the monition the judge, sitting at Westminster, issued an inhibition inhibiting the clerk for three months and thereafter until relaxation from performing any service of the church within the diocese, and on his persisting in his disobedience, pronounced him contumacious and issued a *significavit* under 53 Geo. 3. c. 127, s. 1. The tenor of the *significavit* was sent by *mittimus* from the Petty Bag Office to the Chancellor of the county palatine of Lancaster. In accordance with an order made by the Vice-Chancellor of the county palatine sitting at Lincoln's Inn a writ *de contumace capiendo* was issued, under which the clerk was arrested by the sheriff of Lancashire and lodged in Lancaster gaol. On a motion for a *habeas corpus*:

Held (affirming the decision of the Court of Appeal), that the matter so heard before the judge, as official principal of the Chancery Court of York, was a cause cognizable in an Ecclesiastical Court within the meaning of 58 Geo. 3, c. 127, s. 1, and that the judge had power to pronounce the contumacy and issue the *significavit* under that act:

That the county palatine being one of the exempt jurisdiction mentioned in 5 Eliz. c. 23, s. 11, the procedure required by that section as to the *mittimus* and the issue of the writ *de contumace capiendo* was applicable and was duly followed:

That the *mittimus* was not one of the writs referred to in Order II, rule 8, of the *rules of the Supreme Court, and was properly tested as in the name of the [658 Queen by the Master of the Rolls:

That under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9, the judge had power not merely to "hear" but also to hear and determine the matter, and to do all the acts which he did at Westminster:

That all the proceedings were regular and there was no ground for a *habeas corpus*.

(*) Affirming 7 Q. B. Div., 273.

[6 Appeal Cases, 685.]

H.L. (E.), May 27, 1881.

[HOUSE OF LORDS.]

685] *THE CONSERVATORS OF THE RIVER LEE NAVIGATION, *Appellants*; and REUBEN BUTTON, *Respondent* (').*Lee Navigation—Towing Path—Evidence of Ownership—Presumption—Onus Probandi.*

Provisions in different acts of Parliament appointed conservators of a river navigation, and gave them full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation, and the making of towing-paths—and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:

Held, that as the acts might be carried into effect without purchasing, the burden of proof lay on the conservators to show that they had purchased; and since they had failed to show it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths.

THIS was an appeal against a decision of the Lords Justices which had varied a previous decision of Vice-Chancellor Malins (').

The act 13 Eliz. c. 18, was passed for "the bringing of the river Lee to the north side of London." It authorized the Lord Mayor, &c., at any time thereafter to make the new cut, and "to have, take, and use for the purpose aforesaid such and so much ground during and by all the length as the said new channel, cut, or river shall pass, as shall be requisite for the conveying of the said water, and also fifty or threescore foot in breadth on each side of the said river, by all the length of the same, &c." The purpose was thus stated, "that all people may with ease go in and out of their tilt-boats, &c., without peril, and so walk, &c., also 686] *that the bargemen may, upon the same ground, without offending any other, draw their vessels from place to place alongest the same." The Mayor, &c., were to "have the said ground alongest all the said whole length for such composition as they shall make," with the lords, owners, and occupiers of the soil and ground. They were not to take any man's ground until they had compounded with the owners, and within ten years after the passing of the act

(') This report was prepared for the press by the late Mr. Charles Clark, Q.C.

(*) 12 Ch. D., 383.

they were to make the cut. The cut and the towing-path were made accordingly.

In 1767 was passed an act (7 Geo. 3, c. 51) "For improving the navigation of the river Lee." This act appointed the Lord Mayor and a great many gentlemen trustees for the purposes of the act, and enabled them to make such bridges and erect cranes along the length of the river as they should think necessary, and to make towing-paths along any of the lands, and generally to perform all acts, &c., which they might think necessary for maintaining and improving the navigation, and the persons affected by these acts were to be compensated. Power was given to the trustees to purchase the lands required from all persons whether under disability or not. The navigation was to be a free navigation for all persons whatever, and the free use of the towing-paths was secured to all, subject to the rates and to the by-laws fixed and settled by the trustees. Cuts and towing-paths were made under the authority of this act, and in 1770 the projected navigation was completed.

Many of the books of the trustees were lost, and there were no conveyances produced at the trial to show the legal transfer of any of the lands of adjoining owners to the trustees, but an act (19 Geo. 3, c. 58) was produced, which appeared to have been passed to enable them to increase their tolls that they might have the means to satisfy their creditors. Among the payments chargeable against the trustees were enumerated "arrears of interest, annuities, rents, compensations, and purchase of lands."

The appellants admitted that some small sums had been paid to individuals, in respect of land adjoining the towing-path before the year 1835, but not since, and they drew from that fact the inference that these were annuities the title to which had ceased, the compensations being completely satisfied. The receipts appeared to be for sums of 30s., [687 and the persons to whom they were paid (Mr. Bell and Mr. Bailey) were described as "occupiers."

The case had been heard before Vice-Chancellor Malins, who on the 20th of May, 1878, gave judgment against the defendant, and granted a perpetual injunction to restrain him from using the towing-path with horses and carriages, &c., or otherwise than as a footway, or in any manner inconsistent with the free and convenient navigation of the river; and costs were awarded against the defendant⁽¹⁾. On appeal this decision was reversed, on the ground that "the plaintiffs" (the present appellants) "have not established

⁽¹⁾ 12 Ch. D., 383.

any right to the freehold, or any possessory right to the soil, of the towing-paths connected with the river Lee," but a perpetual injunction was awarded to restrain "the defendant, his agents, &c., from in any manner damaging or obstructing the towing-path connected with the river Lee navigation, or using the same in any manner which interferes with its free use for the navigation of the river," and the plaintiffs were ordered to repay to the defendants the costs they had received from him under the Vice-Chancellor's judgment and also his costs of the appeal (*). The plaintiffs then brought this appeal.

John Pearson, Q.C., Romer, Q.C. (Bond Coxe with them), for the appellants.

The object of the various acts was to provide an easy and convenient mode of communication between the town of Hertford and the Thames, by means of this navigation. That was a public object and sought to be accomplished by the appointment of trustees empowered to carry it into effect, having the requisite powers conferred on them for that purpose. Afterwards by the change of trustees into conservators of the navigation, similar powers were conferred and duties imposed on them for the same purpose. These powers were useless, and these duties were impossible of performance, if the conservators had no title to the soil over which the powers were to be exercised and as to which the duties were to be performed. For whatever the conservators might determine and order could be disregarded, and they would have no authority to enforce their orders. If 688] every landowner along the *line of the navigation was the owner and master of the land opposite his own private property, the conservators would have no right to enter upon it to maintain the navigation, and to provide for the freedom of the exercise of the right of navigation which it was the object of all the acts to secure for the use of the public. It was true that the conservators, though expressly authorized to impose tolls, could not appropriate them for their own benefit, and so appeared to have only a defective title to them, but that was in accordance with the spirit of the acts, which was entirely directed to effect a purpose of public benefit. But it did not at all show that the conservators' rights were no greater than those of persons who had merely to receive the tolls and pay them away again. The tolls were to be employed for the purpose of maintaining and improving the navigation, in other words for the purpose of effectuating that public duty the performance of

(*) 12 Ch. D., 399.

which had been imposed by the Legislature on the conservators. There was no doubt that the Legislature had endeavored to effect this public purpose with as little intermeddling as possible with private rights, and so the landowners along the line had been allowed access to the towing-path, but that was to enable them to have access to the river, not to allow them to use the towing-path in such a way as to interfere with its free and convenient use by the navigators of the river. In the sameway all persons were free to use the towing-path as a foot-path, but not so to use it as to cause any obstruction to the navigation. But how were these abuses to be prevented, if the conservators had no powers but of that anomalous and unintelligible kind for which the respondent contended? There were cases of course in which persons might be invested with powers of a limited kind, to effect a limited object. But that could not be so with those who were selected by Parliament to improve and maintain the free and convenient navigation of a river for the benefit of the public.

The power to purchase lands for the purposes of the acts was given to the conservators, and, beyond that, they were forbidden to take the lands of any man without making him compensation. They had long possessed these lands, there was no doubt of that, there could be none that they must have acquired them in the way authorized and required by the acts. It was true that they did *not possess the [689 conveyances which would, in point of form, establish their legal title to these lands, but the fact of long and undisputed possession, and the other fact (set up by the respondent himself) that certain payments had been made before 1835, pointed plainly to the conclusion that compensation, in the way of direct purchase, or of annuities, may have been made, and that all the compensations were now at an end. In the course of the argument *Winch v. The Conservators of the Thames* (*), *The King v. The Severn and Wye Railway Co.* (*), *Hollis v. Goldfinch* (*), and *The Lord Advocate and The Clyde Navigation Trustees v. Lord Blantyre* (*), were referred to and commented on.

J. N. Higgins, Q.C., *Crossley*, Q.C., and *Birrell*, appeared for the respondent, but were not called on to address the House.

THE LORD CHANCELLOR (Lord Selborne): My Lords, I believe that all your Lordships are of opinion that it is unnecessary to hear the counsel for the respondent. This case

(*) Law Rep., 9 C. P., 378; 10 Eng. R., 212.

(*) 2 B. & Ald., 646.

(*) 1 B. & C., 205.

(*) 4 App. Cas., 770.

comes before your Lordships on an appeal from an order of the Lords Justices, varying an injunction of Vice-Chancellor Malins. [His Lordship having stated the nature of the case and the decisions in the court below, proceeded :]

This question depends upon certain acts of Parliament, and on those things which have been done under them. The principal act is an act of 1767, the 7 Geo. 3, c. 51, having in it a series of clauses which I will now proceed to mention, postponing for the present the consideration of those which relate to the purchase of land. The first clause, independently, as I think, of the purchasing clauses, gives power to the commissioners of the navigation to make the necessary improvements in the river itself, "and also to set out and make towing-paths or haling-ways upon any of the lands or grounds aforesaid, for towing or drawing with men or horses or other cattle, boats or other vessels using the said navigation." The second clause provides "that a full and adequate satisfaction and compensation be made in manner hereinafter mentioned, to all persons for the damage they may sustain from the carrying this act into execution as aforesaid." My Lords, I said I would not dwell at present upon the purchasing clauses. There are purchasing clauses in the act, and for the purposes of this case they will have to be considered ; but I regard those purchasing clauses as being independent and additional,—not as taking away the powers which, if the purchasing clauses had not existed in the act, would have been given by these original clauses which would have enabled the commissioners, although they did not purchase, to make and set out towing-paths provided they made compensation, for which adequate provision is contained in the act.

Well, my Lords, the other clauses which may be mentioned in connection with these powers, are, in the first place, the 94th, a clause which enables them, and, as I think, obliges them to a certain extent, to set up gates in order to prevent cattle and other animals from straying along the towing-path from one property to another. It says that they "shall cause to be made, set up, and from time to time maintained and kept in repair, convenient and substantial gates," and so forth, "in the towing-paths," "where the same shall respectively be necessary." That I apprehend is for a purpose which was necessary and proper to be provided for, but one in no degree requiring in itself the possession of any right to the soil. The 69th clause says "that the said navigation shall from henceforth be a free navigation, and that all the King's liege people whomsoever

shall and may have and lawfully enjoy free passage along, in, through and upon the channel of the said river" "for boats," and so forth; but that is to be "subject to the orders and by-laws which shall be from time to time made by the trustees, or any seven or more of them, for the regulation of the navigation." I should have mentioned that the 1st section, part of which I read before, says at the end of it, that the trustees may do all things necessary for maintaining the navigation and executing, generally, the powers vested in them. The 100th clause gives an express power "to make by-laws, orders, and constitutions for the good and orderly using of the navigation," and for other purposes, with fines and forfeitures. And penalties for any damage to the navigation are imposed under the 104th clause: "If any person or persons shall wilfully and maliciously *cut, break down, damage, or destroy any [69] banks or other works erected or made, or to be erected or made, for the purposes of the said navigation," the persons who do so "shall be adjudged guilty of felony."

Then, my Lords, in connection with those clauses, it is proper to mention the 111th which relates to certain rights of riparian owners: "Nothing in this act contained shall be construed to obstruct or hinder the lord or lords of the manor or manors, or the owner or owners of any lands or grounds lying upon or near the banks of the said river, or of any lands or grounds through which the said cuts shall be made, from making or erecting any warehouses, weigh-beams, cranes, quays, landing-places, or wharves upon the banks of the said river or cuts in and upon their own lands, wastes, or grounds, so that the erecting or using of such warehouses, cranes, or wharves do not obstruct or prejudice the said navigation or any of the powers given by this act." And, my Lords, that clause appears to me strongly to confirm the conclusion which I draw from the earlier clauses, that the Legislature did not contemplate that the purchase and taking of land would be necessary for the purpose of setting out the towing-paths or for the purpose of the navigation, although it thought right to give power to purchase, and to take even by compulsion; because this clause, speaking of what is to be done by the adjoining owners upon their own lands, plainly contemplates some things being done which it is difficult to suppose could be done if in all cases there were between their lands and the river a towing-path interposed over which they had no proprietary right.

I said, my Lords, that I would consider how this case stood, or would stand, upon the clauses which I have

referred to in the act, supposing there were no power to purchase. It appears to me that it is quite clear, that had there been no other clauses in the act than these, not only would purchase not have been necessary, but purchase might not have been possible. At all events compulsory purchase would not have been possible; and yet there would have been abundantly sufficient powers to do everything required for the purpose of the navigation. All the acts proved to have been actually done by the trustees or the conservators would properly and consistently have been [692] done under those *powers. For example, they made by-laws for the purpose of excluding trespassers, and I think quite properly and legitimately, whether you look to the original act or to the act of 1868. Notices to exclude trespassers and to prevent animals straying upon the line; fines to be recovered before magistrates for a breach of the by-laws; repairs to keep the towing-path in proper order and condition; everything that was incident to the use of the towing-path, such as the erection of gates, which by one of the clauses I have read are expressly required to be put up (and the evidence in this case appears to me to show that one of the gates was placed in a position where, if not necessary, it would at all events have been proper); all these are acts which if not necessarily done, would have been properly done, under one or other of the clauses I have referred to in the act of Parliament, though no purchase whatever of soil had been made.

One of the cases which I see is mentioned by Vice-Chancellor Malins as having been referred to before him in the argument, namely, the case of *Hollis v. Goldfinch* (*) is at least an illustration of the perfect consistency of all such acts with the powers contained in the clauses I have read, apart from any purchase, and apart even from any compulsory power to purchase. The case of the *Lord Advocate and the Clyde Navigation Trustees v. Lord Blantyre* (**) determined that very large powers, as large, and I rather think larger than those in this act, given to the trustees of the Clyde navigation for the purposes of the improvement of that river, and which might be exercised upon the foreshore of Lord Blantyre's property, did not make it necessary for the trustees by purchase (although in their later acts there were purchasing powers) to acquire that foreshore, and did not in any way entitle them as against Lord Blantyre to set up a claim of adverse possession and owner-

(*) 1 B. & C., 205.

(**) 4 App. Cas., 770.

ship, by reason of the acts of this nature which they had done upon his soil so as to exclude his proprietary rights.

Well, then, my Lords, the question really comes to be this: There were undoubtedly purchasing powers in the act; the 5th clause enabled the commissioners to purchase, but did not compel them to do so; the 7th clause enabled them, if they thought *necessary, to exercise compulsory powers, not for the particular purposes of the towing-paths, but in a more general way; and, therefore, although it was quite possible for them not to exercise those powers but to do everything they have done without purchasing, still it was possible for them to use those powers and to become purchasers. The first question which I ask your Lordships to consider is, upon whom the *onus probandi* lies under these circumstances. The trustees might or might not purchase, the question is, Did they purchase or did they not? Is it to be presumed that they purchased, or is it necessary for them to prove that they did so? I think, my Lords, that, as the purchasing would be an act which would change the title to the soil in a manner not necessary for the purposes of the statute, the burden of proof is upon them to show that they did purchase. They assert an exclusive title, which, if they had acquired it, would displace the title of the previous proprietor. It is for them to show it, and if all the acts they have done are consistent with the other alternative, then they must produce evidence upon which a conclusion of that kind can be founded.

Now, my Lords, what evidence do they produce? They show that before the works under the act were executed, the trustees had plans prepared by an eminent engineer named Smeaton. He divided the work to be done into sections. I will disregard what he advised as to other sections, but he advised that in the particular section which includes the towing-path in question, there should be some lands purchased by the trustees, amounting in the whole, I think, to sixteen acres. He does not specify, and there is no evidence which does specify, the particular position of those sixteen acres of land or the particular purposes for which they would be required, whether for making cuts, for straightening the river, as in some places it was done, for making towing paths, or for any other purposes which they had authority to carry out. So far all that appears is this: that Mr. Smeaton contemplated the acquisition by purchase of sixteen acres of land, somewhere or other, within a considerable section, a small part of which is now in question.

That does not carry the matter very far. He also contemplated that the expense of making towing-paths, and doing a number of other things which are mentioned, would be 694] *altogether upon the average £20 a mile. Towing-paths, if they did not find them already existing, they would certainly have to make. That, therefore, carries us very little further still. Then what followed? It appears that on the 1st of July, 1767, there was a resolution to execute the powers of the act and to make towing-paths. There was nothing whatever said about the purchase of this particular land, or, as far as I can see, of any land, for the purpose of the towing-paths. Mr. Child, one of the principal witnesses for the appellants, says (') that the existing towing-paths (for there were towing-paths then in existence) were made use of as far as they could be. That certainly does not show that it was thought necessary to buy the soil.

Then what have we added to those facts? Nothing but a thing which might have been important if Mr. Bell and Mr. Bailey had been proved to be the owners in fee of this land, namely, that from the year 1767 to the year 1835 inclusive there was paid to a person named Bell first, and afterwards to a person named Bailey, a sum of 30s. a year for the land taken for the purposes of the navigation, and in some receipts described as used as a towing-path; and one of the witnesses, not I think in a manner which is very conclusive, but in a manner which for the present purpose I will assume to be sufficient, says that he thinks he can identify the land described in those receipts with a portion of the towing-path now in question. As the greater part of the wharf was called Bell's Wharf and the lane is called Bailey's Lane, it is probable, and I will assume, that Mr. Bell and Mr. Bailey had something to do either with the proprietorship or with the occupation of the land which now belongs to Mr. Button. My Lords, in those receipts Mr. Bell and Mr. Bailey are described, not as owners, but as "occupiers." Payment to occupiers, however, it might be explained, would certainly not be evidence of the purchase of the fee simple for a perpetual rent-charge from the owner; and when we find that these payments entirely stopped in the year 1835 it is still more necessary to add something further before you can infer, from the fact of that payment of 30s. a year having been made to those persons for so long a time, that there was a purchase in fee simple of the soil of 695] this towing-path *from those owners. They are not shown to have been owners, they are not described as

(') Printed papers in the case, pp. 77, 79.

owners, and if there had been this perpetual rent-charge, how is it and why is it that that has not been paid since the year 1835?

But, my Lords, not only is there a deficiency of all explanation and of further evidence upon these points, but you have to consider on the other hand the averments on both sides as to the title to the property in dispute, and such other evidence as exists with regard to that title. On both sides it is averred, not that Bell, or Bailey, or either of them, but a gentleman named Craven, the owner of a very considerable estate called the Craven Park estate, was the predecessor in title of Mr. Button. When Mr. Craven obtained the title does not appear, but the averment on both sides is that Mr. Craven was the predecessor in title of the respondent; and one of the witnesses for the appellants, Mr. Glass, who gave his evidence in 1877, said that he had known the river and navigation for fifty years, and had himself been connected with the service of the trustees for forty years, and he knew Mr. Craven as the owner in 1836, the very year after the last of those payments was made to Mr. Bailey, and what is more, he never knew any one but Mr. Craven as the owner.

My Lords, under those circumstances, especially as the respondent offered to produce the titles and to put the court in full possession of whatever those titles might have shown, and the appellants objected, which perhaps they had a right to do, I think it is wholly impossible to infer from the evidence in the case that Mr. Bell and Mr. Bailey were owners in fee simple, having an estate or interest which would enable them to sell the fee simple of this towing-path to the trustees of the navigation, or that they did so. On the contrary, I think the inference is rather that they were merely what they are described as, that is to say, occupiers, and that it was owing to some unexplained term of an agreement made originally with Mr. Bell as such, that the payments, lasting so long as until 1835, were made. Whether there was any oversight, or whatever else may have been the explanation of this, at all events in that state of the evidence your Lordships cannot infer the explanation to be that they were able to sell and did sell the estate in fee simple to the trustees.

*My Lords, it is hardly necessary to refer to cases [696 in illustration of such a matter, but I remember that something not entirely dissimilar occurred in the the Court of Chancery, in a case in which there was evidence of payments not going back quite so far in point of time, the case of the

Somersetshire Coal Canal Company v. Harcourt (¹), and it was held to be wholly insufficient to justify any presumption that, in the circumstances of that case at all events, there had been any such sale. No doubt the circumstances of the case were in some respects different from these. I do not refer to it as an authority; I refer to it as an illustration only, showing that payments of that kind may be made without at all warranting the inference that they are made upon the footing of proprietary rent-charge, and in purchase of the fee simple. They may be made for temporary reasons; this was a temporary payment and not a permanent payment. Therefore, I think you must come to the conclusion that there is a total failure of evidence, and that there was no purchase in this case.

But, my Lords, it does not stop there, because on the other hand there is evidence, I think unexplained and of considerable weight, to show the assertion by Mr. Craven at some period within the last forty years of powers and rights over this towing-path not dependent upon any assent or permission of the trustees, and quite inconsistent with the supposition that the fee simple was vested in them and not in him. It appears that at a time, not exactly fixed, but certainly not very distant, he enlarged the wharf belonging to him along the line of the towing-path, and extended it in front of the ground then occupied by a coke oven, and in doing so he interfered with the *solum* of the foreshore where the towing-path was. He laid down heavy beams and timbers upon that *solum* for the purpose of maintaining the timbers upon the frontage of his wharf, and connecting them with his property in the coke oven yard. It does not appear that that was done *precario* and by permission of the trustees. There would have been an entry in their books if it was so, but there is no such entry, and the inference is that it was done by him as of right, and that it was acquiesced in by them, because they did not, at that time, claim to have [697] power to prevent it. He also *erected a wall and fence all along his land by the towing-path, and the existence of that wall and fence was by virtue of his own right of property; whether that was on the towing-path or not I do not know. I will not go into the other evidence, which is more disputed, as to the nature of his user of the towing-path, but it appears to me to be a reasonable inference from the evidence that he not only used the towing-path as he thought fit, in order to carry the produce of his coke ovens to the markets along the canal, but that he also used it when

(¹) 24 Beav., 571; 2 De G. & J., 596; 27 L. J. (Ch.), 189 625.

it suited his convenience for the purpose of carrying round that produce over the towing-path to the entrance to Bailey's Lane.

But it is not necessary that your Lordships' decision should depend upon the view you may take of the acts of possession done by Mr. Craven or those claiming under him. It was, as I said before, for the appellants to make out the right they claim. In my opinion they have failed to do so, and therefore I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN and LORD WATSON fully concurred and for the same reasons.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 27th May, 1881.

Solicitor for appellants: *R. J. Pead.*

Solicitors for respondent: *Davidson & Morriss.*

[6 Appeal Cases, 698.]

H.L. (E.), August 3, 1881.

[HOUSE OF LORDS.]

***JOHN JENNINGS, *Appellant*; and EDWIN JORDAN [698
and JOHN PRICE, *Respondents*.**

Mortgage—Consolidation—Redemption Suit—Parties—Trustees—Rules of Court, 1875, Order XVI, r. 7.

The mortgagor of one property assigned the equity of redemption, and afterwards mortgaged another property to the mortgagee of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the mortgages:

Held (affirming the decision of the Court of Appeal), that the right of the purchaser of an equity of redemption cannot be affected by a mortgage created after the purchase, and that the assignee was entitled to redeem the first mortgage without redeeming the second.

Also that under Order XVI, rule 7, trustees of an equity of redemption sufficiently represent their *cestuis que trust* in a redemption suit, no direction to the contrary having been made by the court.

Tassell v. Smith (2 De G. & J., 718; 27 L. J. (Ch.), 694) overruled.

Bevor v. Luck (Law Rep., 4 Eq., 537) commented on.

White v. Hillacre (3 Y. & C. (Ex.), 597) approved.

APPEAL from two orders of the Court of Appeal made respectively on the 14th of February and 5th of June, 1880 (').

The facts and arguments are stated in the judgments of Lords Selborne and Blackburn.

(') *Mills v. Jennings*, 13 Ch. D., 689.

June 23, 24, 27, 28. *Davey*, Q.C., and *Bompas*, Q.C. (*Townsend* with them), for the appellant.

North, Q.C., and *Selfe*, for the respondent Jordan.

Millar, Q.C., and *Gaskell*, for the respondent Price.

Their Lordships took time to consider.

Aug. 3. THE LORD CHANCELLOR (Lord Selborne): My Lords, the action in this case was to redeem a mortgage of certain copyhold property at Cheltenham, created on the 699] 6th of *October, 1836, to secure £500 and interest (to which a further charge of £250 and interest was added in the following year) to one John Merrett. The equity of redemption, not of the whole, but of certain cottages which were part of this mortgaged property, was on the 3d of December, 1838, settled by the mortgagor, Thomas Tale, for valuable consideration, on the marriage of his daughter, subject (as between Thomas Tale and the parties interested under the settlement) to the charge of £250, and interest thereon; and with a covenant by Thomas Tale to keep the settled cottages indemnified from the residue of the mortgage debt, viz., £500 and interest. The plaintiffs (of whom the respondent Jordan is the survivor) were the trustees of that settlement.

Another mortgage, upon distinct property (freehold land at Cheltenham), had been made in 1834 by the same mortgagor, Thomas Tale, to one Middleton, upon which (together with a further charge made in 1836) there was due, at the time of the settlement of the cottages, £500 and interest.

And on the 16th of December, 1836, the property so mortgaged to Middleton, and the copyhold property (other than the cottages) included in Merrett's security, were mortgaged by Thomas Tale to John Tale, to secure £500 and further advances, not exceeding altogether £1,000, with interest thereon.

At the date, therefore, of the settlement, Merrett's was the only direct charge upon the cottages; but they were not redeemable separately from the rest of the copyhold property, mortgaged first to Merrett, and secondly to John Tale. And, as against John Tale, the mortgage of that copyhold property was not redeemable separately from the freehold, of which John Tale was second mortgagee, and which he was then entitled to redeem from Middleton.

After the settlement (on the 30th of October, 1839,) Thomas Tale mortgaged certain other copyhold property belonging to him in Union Street, Cheltenham, to the same John Tale, to secure £400 and interest. In 1849 John Tale's and Mid-

dleton's mortgages became vested (after certain mesne assignments) in the predecessor in title of the appellant John Jennings; and in September, 1857, Merrett's mortgage was also transferred to the appellant's predecessor in title.

*At the hearing before Bacon, V.C., on the 2d of [700 April, 1879, the action was dismissed, not upon the merits, but because (leave to amend by adding parties having been previously given) the Vice-Chancellor thought that the persons properly entitled to redeem the mortgages vested in the appellant Jennings were not all before the court. On appeal, the Lords Justices differed from the Vice-Chancellor, and made a decree for redemption, of which the appellant Jennings now complains.

I postpone the consideration of the objections to the constitution of the suit, which were urged at your Lordship's bar, and which, in my opinion, ought not to prevail. For the present, I address myself solely to the question, whether (assuming all necessary parties to have been before the court) the decree now under appeal is right, or ought to be in any respect varied.

The appellant Jennings claimed, by his pleadings, a right to consolidate, against the plaintiffs, all his securities, including the mortgage of the property in Union Street, Cheltenham, originally made to John Tale on the 30th of October, 1839, after the equity of redemption of the cottages had become absolutely vested in the trustees of the marriage settlement of the 3d of December, 1838. The Lords Justices held that Jennings was entitled to consolidate all the other mortgages, which were prior to that settlement; but that this right did not extend to the Union Street mortgage, and they decreed accordingly.

Upon this, which was the principal question in the cause, I agree with the Lords Justices. A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence) is called "equity of redemption," may, within certain limits, and against certain persons (entitled to redeem all or some of them), "consolidate" them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all. This doctrine of consolidation is well established, and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application, when all the mortgages, whether originally made to the same mortgagee, or having come into a single

701] *hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which, after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they had been combined, though it may, perhaps, be open to objection on some practical grounds, rests upon an intelligible principle. The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor; of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one. The mortgagee cannot lose that right, because the mortgagor thinks fit to separate the equities of redemption. The two mortgages having already become virtually one, the purchaser of part of the equity of redemption is no more entitled to escape from this position, than the present plaintiffs would have been to redeem the cottages only, without also redeeming the rest of the copyhold property included in Merrett's mortgage.

In the present case, the rights of redemption, existing at the date of the settlement of 1838, could not, in my opinion, have been properly worked out (unless by some voluntary arrangement between the parties interested), otherwise than by consolidating all the mortgages now vested in the appellant Jennings, which were prior in their creation to the 3d of December, 1838; as they have been, in fact, consolidated by the decree of the Court of Appeal.

I have much more difficulty in following, or satisfactorily explaining, the principle of some other authorities (such as *Beevor v. Luck* (')), which have held (contrary to the decision of Alderson, B., in *White v. Hillacre* (')) that a mortgagee's right to consolidate, as against the purchaser of the equity of redemption of property mortgaged to him, is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages, which were then in other hands, and with the equity of redemption of which (if there were no consolidation) the purchaser would have nothing to do.

702] *I do not, however, think it necessary or proper now to determine whether this enlargement of the doctrine has been (as some eminent judges have thought) conclusively settled by authority. The explanation of it which has been offered is, that at the date of the purchase of the equity of

(') Law Rep., 4 Eq., 537.

(') 8 Y. & C. (Ex.), 597.

redemption the doctrine of consolidation was potentially applicable to any two or more mortgages, then in existence, and redeemable by the same person (although then in separate hands), if they should afterwards come together. I cannot say that this commends itself to my mind as reasonable or equitable; but the contention of the appellant, in the present case, goes much further. He seeks to consolidate with securities which were in existence on the 3d of December, 1838, a mortgage of later date, on property not included in any of those securities. It is against all principle that a vendor should be enabled, after parting with his whole interest in particular property, to impose an additional burden upon it without the purchaser's consent; not by any express contract (which might in some cases prevail, if protected by a legal estate without notice), but indirectly, and without any contract at all. For my own part, I cannot conceive anything more absolutely inequitable; and there is no authority for it, unless it be *Tassell v. Smith* (*). If *Tassell v. Smith* (*) is distinguishable upon its particular circumstances, it is no authority for that proposition. If not so distinguishable, it is inconsistent with the decision of Hall, V.C., in *Baker v. Gray* (*), and of the Lords Justices in the case now before your Lordships.

The observations of Lord Hardwicke in *Titley v. Davies* (*), as to the difference between the position of Davies, whose mortgage from Jenyns was subsequent in date to the sale to Peyton, and that of the incumbrancers whose securities were prior to that sale, are (as it seems to me) in accordance with sound principle, and with the decisions of Hall, V.C., and of the Lords Justices in the present case. I cannot, therefore, regard *Tassell v. Smith* (*) as an authority which ought to be followed on this occasion, great as was the eminence of the judges who decided it.

The decree, therefore, of the Court of Appeal was, in my *opinion, right in refusing the consolidation claimed by [703 the appellant, so far as relates to the Union Street mortgage. In consolidating the other mortgages held by the appellant, it gave effect to a claim which he had made by his pleadings, and which was never disputed by the plaintiffs. The appellant's counsel did not retract that claim, either before or after the judgment of the Court of Appeal; but when the decree had been drawn up, passed, and entered, it seems for the first time to have occurred to him that, unless he could consolidate all, it was not for his interest to consolidate (as

(*) 2 De G. & J., 713; 27 L. J. (Ch.),
694.

(*) 1 Ch. D., 491.

(*) 2 Y. & C. (Ch.), 405.

against the plaintiffs) any of his securities : the Union Street mortgage being (as he now suggests, though this does not appear by any evidence in the cause) the only one of his securities which is deficient, and the account being directed against him as mortgagee in possession, which he and his predecessors in title have for many years been. Something was said at the bar about the possibility of his being able to set up the Statute of Limitations against the respondent Price (who represents in this suit the equity of redemption in all the mortgaged property (1), except the cottages of which Jordan, the surviving plaintiff, is trustee); and it was insisted, that the effect of the decree is to deprive him of the right which (if still redeemable by Price) he would otherwise have had, to consolidate the Union Street mortgage with the other securities as against Price, though he could not do so as against the plaintiffs.

To avoid these apprehended results of the decision against him, the appellant, on the 29th of May, 1880, after the decree had been formally completed, gave notice of a motion before the Court of Appeal, to "correct" that decree, by omitting the declaration contained in it that he was entitled to consolidate his other securities (prior to the settlement of the 3d of December, 1838), with the mortgage and further charge originally made to Merrett; and by limiting the consequential directions to an account first, of what was due to the appellant for principal and interest, not generally on Merrett's securities, but only in respect of the £250 and interest, which, under the terms of the settlement of the 3d of December, 1838, was to be borne (as between the settlement and 704] *Thomas Tale) by the settled cottages; and secondly, of the rents and profits of the settled cottages only, which the appellant or his predecessors in title had (or without his or their wilful default might have) received. This motion was properly refused by the Lords Justices; on the ground, that what it sought was not a correction or alteration of any "slip" in the decree, but a substantial change in it, not asked for at the hearing, and contrary to what was then intended and understood by the court and by all the parties. The present appeal is not only against the decree made on the 14th of February, 1880, but is also against the order refusing that motion made on the 5th of June, 1880; and it has been contended, at your Lordships' bar, that the decree ought to have left it open to the appellant to make an election, whether he would consolidate or not. Your Lordships

(1) Under a deed of the 6th of May, the equity of redemption to trustees of 1868, whereby Thomas Tale conveyed whom Price was the survivor.

did not think it necessary to hear the respondents' counsel on that point; being of opinion, that, if the appellant had ever possessed the right of election which the argument assumed, he had made his election, and was too late to retract it after judgment and decree; that the decree was (in this respect) right at the time when it was made, and could not become erroneous by reason of any subsequent change in the appellant's view of his own interest; and that, when such a decree for consolidation had once been properly made, the parties entitled to redeem, as well as the incumbrancers, had acquired a right (of which they ought not to be deprived without their own consent) to any benefit which might result to them from it.

It is not necessary to determine, whether, under the circumstances of this case, the appellant had a right, at or before the hearing, to take, at his election, such a decree as was asked for by his notice of motion of the 29th of May, 1880. As at present advised, I do not think that he had that right. A suit for redemption must be so constituted, in respect of parties and otherwise, and the decree made in it (unless varied by consent of all parties interested) must be such as to enable the court to do complete justice, not only to the plaintiffs, and the incumbrancers whom they seek to redeem, but to all other parties, before or behind them, whose redemption or foreclosure may be necessary to work out the equities of the case. To split Merrett's incumbrance, as *to the £500 and the £250 thereby secured, [705 and to limit the accounts to that part only of the property included therein of which the plaintiffs were trustees under the settlement of the 3d of December, 1838 (as was asked by the notice of the 29th of May, 1880), would seem to be inconsistent with the principles laid down and acted upon in *Palk v. Clinton* (*), and *Thorneycroft v. Crockett* (*). If the plaintiffs redeemed Merrett's securities, they were entitled also to clear that part of the property included in them, which was not included in the settlement, from John Tale's second mortgage of the 16th of December, 1836; and, if they did this, it would seem to follow that they were at the same time entitled to redeem all the property included in that mortgage to John Tale, among which was the freehold land previously mortgaged to Middleton.

It was the intention of the Lords Justices (as appears by the shorthand note of what passed after their judgment), that a decree should be drawn up, according to the ordinary course of the court, for the dismissal of the action if

(*) 12 Ves., 48, 59.

(*) 3 H. L. C., 239, 254, 255.

the plaintiff Jordan should not redeem the appellant's mortgages (other than that on the Union Street property), and, if he should redeem those mortgages, for subsequent redemption or foreclosure (as to the property other than the settled cottages), between Jordan and the respondent Price. With such subsequent redemption or foreclosure, James, L.J., said, the appellant would have nothing to do. The decree, as actually drawn up, provides only for redemption or dismissal as between Jordan and the appellant. It could not have been drawn up in that form without consent, before the Registrar, by all parties whom he considered interested, to the waiver and omission of all accounts and directions for redemption or foreclosure as between Jordan and Price. I think your Lordships must assume that those accounts and directions were, in fact, waived by such mutual consent between Jordan and Price; though it does not so appear on the face of the decree. Whether the appellant consented to or acquiesced in such waiver, may be doubtful. In his notice of motion to alter the decree, he did not object to it on this ground, though, if he had a right to do so, the omission of such accounts and consequential 706] directions, necessary. *according to the ordinary course of the court, would have been an error, not of the court, but of the Registrar, and might properly have been set right upon a motion of that kind. As, however, James, L.J., considered this to be a matter with which the appellant had nothing to do, I think it was open to him, upon the present appeal, to object to the decree on that ground, if he could show that he had in fact such an interest as entitled him to make the objection. If he has no such interest, it would not be according to the usual-course of your Lordships' House to determine, at his instance, any question concerning the respondents only, neither of whom has appealed. But, I think it right to say, that having regard to the position and character of both the respondents (who represent here absent parties, for whom they are respectively trustees), I doubt whether this is a case in which the decree ought to have been drawn up in the form in which it stands, even by their consent; and I shall propose to your Lordships that certain words should be added to it, which may prevent it from becoming the occasion of future questions, and possibly new litigation, between these trustees, and parties now absent from the record.

The conclusion to which, after consideration, I have come, is, that the decree, as between the appellant and the respondents, is right in form as well as substance; and that the

appellant had no interest in any further accounts or directions which might properly have been added to that decree, and, consequently, that he has no title or interest now to complain of their omission.

The effect of consolidation is to make the consolidated mortgages practically one; and the right of the plaintiff Jordan, if he pays what is due to the appellant upon the account directed by the decree, to have a conveyance from the appellant of the whole mortgaged property, is clear. Any question as to the application, as between the different estates included in the consolidated mortgages, of the rents and profits which may be charged against the appellant in taking the account, is *res inter alios*, with which the incumbrancer, after he has been paid off, will have nothing to do. And the case is really the same, even if it should appear, upon the result of the account, that nothing at all is due to him. The plaintiff is still entitled to the benefit of his right of redemption, *and, therefore, to a convey- [707
ance of the whole property included in the consolidated securities. As against those who stand behind him, and who are entitled to redeem from him part of that property, he will have a right to charge, upon everything which is so redeemable, his costs of suit, which may be considerable. Equities of some complexity may arise in such a state of things; but they are equities to which the first incumbrancer, who will have been wholly paid off, must be a stranger. It is a fallacy to suppose that, under such circumstances, he can, in any possible event, retain a right to consolidate the Union Street mortgage with the securities which will have been redeemed, against the persons entitled to ulterior equities of redemption. Consolidation can only take place when there are two or more incumbrances, at the same time subsisting, united in the hands of the same incumbrancer.

The case of *Baker v. Gray* (¹), before Hall, V.C., in which the decree provided for consolidation against one of the defendants, and refused it as against others, was different from the present. There, the right to consolidate was claimed by the mortgagee, who was plaintiff in the suit, against all the defendants. It is clear that, in such a case, the decree might be, and ought to be, so made as to give the plaintiff what he was entitled to against each defendant. If he should be redeemed by a person against whom he had no right to consolidate, he must (of course) be redeemed without consolidation. But if the person to whom the right of redemp-

(¹) 1 Ch. D., 491.

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Jennings v. Jordan.

H.L. (E.)

tion either belonged in the first place, or might afterwards come in default of redemption by those standing before him, was one against whom he had a right to consolidate, then the decree ought to be made accordingly. In the present case the plaintiffs were persons against whom the appellant had no right to consolidate the Union Street mortgage; and, if they did not redeem the other property, their action would be simply dismissed, and no question as to any posterior right of redemption could arise. If they did redeem, the securities which they redeemed would necessarily, and forever, pass out of the appellant's hands, and none of them could afterwards be consolidated with the other mortgage, which he retained.

708] *I have now to state my reasons for thinking that the objections to the constitution of the suit, which were urged at your Lordships' bar, ought not to prevail. They were four in number. The first and second were, in effect, that the ultimate equity of redemption of the mortgaged premises was not properly represented upon the record by the respondent Price, who claims it as trustee of a settlement made by Thomas Tale on the 6th of May, 1868; on the ground that Thomas Tale, on the 6th of October, 1845, presented a petition to the Bristol Court of Bankruptcy, under the then Insolvent Debtors Act, and that all his interest in the mortgaged premises thereupon became vested in the official assignee of that court; and that he also executed, on the 9th of October, 1845, an indenture, by which (if he had then any equity of redemption in the premises) he conveyed it to John Brend Winterbotham, in trust for George Tale, who had previously acquired the title of the mortgagees. The petition presented by Thomas Tale to the Bristol Court of Bankruptcy was produced from the proper custody. On the back of it the word "dismissed" is written, in the handwriting of one Turner, who was then an officer of the court; and it was shown, that such an indorsement might have been so made according to the course of that court, when a petition was dismissed for non-prosecution; but that it could not properly have been made without the authority of the Commissioner or the Registrar. The indorsement is not signed, or even initialed, and there is no entry corresponding with it in the Registrar's book. But of the fact that this petition was never prosecuted, there can be no doubt. The order for protection, given (according to the usual course) to the petitioner, was limited till the 7th of November, 1845, and it might then, and afterwards from time to time, have been renewed; but there was, in

fact, no renewal. Nothing was ever done upon that petition beyond the initial steps necessarily and always taken in such cases ; it plainly died a natural death thirty-three years before the commencement of the present action. Under these circumstances the presumption of fact is in accordance with the indorsement. The equity of redemption in the mortgaged premises, if it had for a time become vested in the official assignee, ceased to be so on the dismissal of that petition. This objection to the title of *the re- [709] spondent Price therefore fails. As to the deed alleged to have been executed by Thomas Tale on the 9th of October, 1845, it has not been produced, nor has its absence (if it was ever executed) been properly accounted for. The Gloucestershire Banking Company, through which the appellant claims, was at that time sub-mortgagee of all George Tale's interest in the mortgaged premises ; and, if this deed had been really executed, it would doubtless have been found with the other documents of title in the possession, formerly of that company, and now of the appellant. The only evidence of its execution consists in certain entries in the books of Messrs. Winterbotham, Bell & Co., solicitors, of Cheltenham, who prepared a draft for that purpose, and had it engrossed, under the instructions of Mr. Onley, a friend of George Tale (then absent in India). If it is the necessary interpretation of the entries upon which the appellant relied that Thomas Tale executed this deed on the 9th of October, 1845, they are contradicted by the law stationer's note upon the draft itself, by which it appears that it was not engrossed till the 10th of October. Mr. John Brend Winterbotham (the intended trustee), who was a member of the firm of Winterbotham, Bell & Co., and Mr. Onley, have both made affidavits, in which they state their belief that this intended deed was never executed, or in any way acted upon. A Mr. Packwood was the solicitor then acting for Thomas Tale ; and if the entries in the day book of the firm ought to be understood as the appellant understands them, they represent that, after receiving a letter from Mr. Packwood on the 7th of October, to the effect that Thomas Tale would not execute this deed, Messrs. Winterbotham & Co. on the same day persuaded him to do so, and (on the next day but one) attended him and took his execution of it. Mr. Winterbotham says (I think justly) that it would have been a professional irregularity for him so to take the execution of the deed by Mr. Packwood's client. He never himself executed that deed, and he believes that the day book entry, "Attending Mr. T. Tale, executing deed" (from which,

doubtless, the similar entries in other books were transferred), ought to have been, "Attending Mr. T. Tale *as to* executing deed." The entries in these books would not be evidence at all, apart from the evidence of Mr. Winterbotham; and, if taken in connection *with what Mr. Winterbotham says, they certainly do not establish the execution of the deed, the burden of proving which rested upon the appellant.

The title, therefore, of the respondent Price is not displaced, either by the petition in insolvency, or by the supposed deed of the 9th of October, 1845.

The next objection was, that the *cestuis que trust* of Price under the settlement of the 6th of May, 1868, ought to have been brought before the court. Having regard, however, to Order XVI, rule 7, of the Supreme Court of Judicature, I think that Price sufficiently represented his *cestuis que trust* for the purposes of this suit, no direction having been given by the court to the contrary.

The last objection related to the absence from this record of the assignee in bankruptcy of George Tale, from whom the title of the Gloucestershire Banking Company was originally derived, by way of sub-mortgage, and who afterwards, before the sale and transfer by the Gloucestershire Banking Company to William Jennings (the appellant's predecessor in title), in February, 1849, became bankrupt. The action was commenced more than twenty-seven years after the date of that transfer; and neither in his pleadings, nor (as your Lordships were informed by counsel at the bar) before either of the courts below, was any objection made by the appellant to the constitution of the suit, on the ground that the assignee in bankruptcy of George Tale had, as between himself and the appellant, a subsisting equity of redemption, in respect of which he ought to have been made a defendant. There is no trace of any such point having been argued before the Court of Appeal. The appellant may well be conceived to have had reasons for not taking any such objection. If it had been taken in due time, the plaintiffs might have been able, without difficulty, to meet it. Whatever might have been its weight, if sooner taken, I think it would be against sound principle, and contrary to the practice of your Lordships' House, now to give effect to it.

It only remains for me to add, that I would propose to your Lordships that the decree appealed from should be varied, by reserving liberty for the respondents, or either of them, or for any of the *cestuis que trust* under the deeds of

the 3d of December, 1838, and the 6th of May, 1868, respectively (in case of *redemption of the mortgaged premises included in the decree by the respondent Jordan), to apply to the Chancery Division of the High Court of Justice for the addition to the decree of any further accounts and directions consequential thereon, which, by reason of such redemption, the court may think just. I do not consider that this variation in the form of the decree (in which the appellant has no interest) ought to affect the costs of the appeal. I therefore move your Lordships that, subject only to that variation, the decree be affirmed; and that the appellant pay the costs of the appeal.

LORD BLACKBURN: My Lords, in this case John Mills, since deceased, and the respondent Jordan instituted an action against Jennings, to redeem certain property which had been mortgaged by Thomas Tale in 1836 and 1837 to John Merrett, which mortgage had been transferred to Jennings, and into possession of which he or his predecessors had entered. And the plaintiffs, in their statement of claim, showed that Thomas Tale, by a deed of settlement made on the marriage of his daughter on the 3d of September, 1838, conveyed to trustees, for the husband and wife, the equity of redemption of a portion of the property comprised in the two mortgages to Merrett of 1836 and 1837, and they showed that the title of those trustees had by mesne assignments vested in the plaintiffs, and they asked to have the usual accounts taken, and to redeem on payment of what was due. Jennings, by his answer, set up a claim to consolidate with the mortgage to Merrett mortgages of another piece of land made by Thomas Tale to John Middleton in August, 1834, and February, 1836, a charge in favor of John Tale created by deed of December, 1836, by which Thomas Tale charged the property comprised in Middleton's mortgages, and also a portion of the property comprised in Merrett's mortgage, but not comprised in the settlement of 1838, and a mortgage of some property in Union Street, made in 1839 by Thomas Tale to John Tale. This Union Street property was not comprised in either the mortgage to Merrett or the settlement of 1838. All those charges had been united by various mesne conveyances in Jennings. And he claimed to consolidate all those mortgages and securities.

*Before Bacon, V.C., the plaintiffs did not dispute [712 that the defendant was entitled to consolidate the mortgages and securities made before the settlement of 1838, but contended that he had no right to consolidate those made subsequent to the date of the settlement of 1838. The Vice-

Chancellor, without deciding this question, held that the plaintiffs ought to join, as necessary parties, those who had the equity of redemption in the mortgages and securities which it was conceded that the defendant was entitled to consolidate. And the objection being pressed, he said that the action must be dismissed unless it was done, but gave leave to amend by adding parties or otherwise.

The writ was accordingly amended by adding the name of John Price as a defendant, and in the statement of claim, besides other amendments, was inserted a prayer, "that it may be declared that the defendant, John Jennings, is not entitled to consolidate as against the plaintiff any mortgages of the said Thomas Tale, made subsequent to the date of the said settlement of the 3d of December, 1838."

The defendant Jennings, by his amended statement of defence, "submits and insists that he can consolidate and is entitled to consolidate as well the mortgages or securities made subsequently as those made previously to the said settlement." The Vice-Chancellor pronounced no opinion upon this question. The proof that Price was the proper party consisted in showing that he was the survivor of two trustees, to whom in 1868 Thomas Tale conveyed all that he then had. And it was proved that in 1845 Thomas Tale had presented a petition for protection from process, and under 5 & 6 Vict., c. 116, s. 1, all his property vested in the official assignee for the time being. And though by 7 & 8 Vict., c. 96, s. 10, on such petition being dismissed all such property reverts in the petitioner, it was said that there was no evidence here that the petition ever had been dismissed. A draft of an assignment by Thomas Tale to John Brend Winterbotham was produced; and it was contended that the assignment had been executed in October, 1845, by Thomas Tale. The dates and the nature of the transaction look most suspiciously as if a fraud upon the Court of Bankruptcy had been in contemplation, but nevertheless if 713] the instrument had been executed it would *have been valid against Thomas Tale. The Vice-Chancellor thought that it was proved that the assignment had been executed, and on that ground dismissed the action. The Court of Appeal, however, came to an opposite conclusion of fact, and thought that the instrument was not proved to have been executed. I do not think it necessary to say more than that I quite agree with them. And as to the evidence of the dismissal of the petition, it appears that the petition was presented, and an interim protection order till the 7th of November, 1845, granted, and that day was fixed for the

further examination of the petitioner. On that day it appears, by the Registrar's book, that the solicitor who was employed for the petition was present for other petitions, but there is no entry whatever as to this petition. When no one appeared either for the petitioner or for the creditors the natural and proper course for the Commissioner was to dismiss the petition. He might, if the case appeared to make it proper, adjourn the case to a future day, or adjourn it *sine die*. But though there is no entry in the Registrar's book that the petition was dismissed, there is, on the back of the petition, in what is proved to be the handwriting of a deceased officer of the court, written the word "dismissed," and during the thirty-five years that have since elapsed nothing has ever been done on it. I think this amply justified the conclusion to which the Court of Appeal came, that the property had reverted in Thomas Tale before he executed the assignment of 1868.

The Court of Appeal had then to determine the question whether the position contended for by the plaintiff in his amended statement of claim before quoted, or that contended for by the defendant, truly represents the law of England as administered in the courts of equity.

Tassell v. Smith (1), a decision by two very experienced equity lawyers, Knight Bruce and Turner, L.JJ., in 1858, was relied on. And the question for the Court of Appeal was, whether this decision was right, or at least was binding upon them. They decided the question in favor of the plaintiff; and the first and most important question brought before the House is whether that decision was right. I do not think it important to inquire whether *the Court [714 of Appeal was bound by the decision of the Lords Justices as being a court of co-ordinate jurisdiction, for this House certainly is not so bound.

The Court of Appeal had not to inquire whether the defendant had or had not a right to consolidate the earlier mortgages, nor, as I apprehend, is any question on that now before this House. Should any one hereafter contend that the plaintiff's counsel conceded more than he was bound to do, the decision of the Court of Appeal will not stand in his way, though other decisions may. I take it that the only question before this House is, whether, where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two.

(1) De G. & J., 718; 27 L. J. (Ch.), 694.

And I do not think it conclusive that the alleged equity was one which, if the matter were *res integra*, could not be maintained, nor even that it was such as, in the name of equity, would work injustice. Some of the rules acted on in the courts of equity, in the kindred subject of tacking securities on the same property, are founded upon this, that a mortgage, after the time specified for redemption had expired, was an absolute estate, which no doubt it was at law, and that the equity of redemption was only a personal equity to take away the legal estate from him in whom it was vested, which perhaps it originally was. It would seem that now after for a very long time equitable estates have been treated and dealt with as to all other intents estates, any rules founded on the antiquated law ought to be no longer applicable, and that *cessante ratione cessare debet et lex*; but some rules apparently founded on this antiquated law have been so uniformly and long acted upon that they must be treated as still binding. And the rule first laid down in *Marsh v. Lee* (*) that if there was a subsequent mortgagee (who, as the legal estate was in another, could only be a mortgagee of the equity of redemption), but whose claim being prior in time to that of a third mortgagee would be satisfied before that of the third mortgagee, yet if the third mortgagee acquired the legal estate even with full knowledge of the existence of the second mortgage, he 715] should be entitled to squeeze out the second *mortgage. In *Brace v. Duchess of Marlborough* (*), in 1728, the Master of the Rolls thought the rule of equity was so settled, "not, however, without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money that the land was of sufficient value to pay the first mortgage, and also his own; to be defeated of a just debt by a matter *inter alios acta*, a contrivance between the first mortgagee and the third, is great severity."

Yet notwithstanding these, as it seems to me, unanswerable objections to the rule, he considered it established. And in *Wortley v. Birkhead* (*) Lord Hardwicke intimates, I think pretty plainly, that if it were then to be settled for the first time he would have decided the other way, but that it was settled; and in *Tilley v. Davies* (*), A.D. 1743, he acted upon it; and now, after the lapse of nearly a century and a half more, I think only the Legislature can do away

(*) 2 Vent., 337.

(*) 2 P. Wms., 491, 492.

(*) 2 Ves. Sen., 571.

(*) 2 Y. & C. (Ch.), 399.

with this rule, which, however, does not apply to this, which is not a case of tacking, or gaining priority for a puisne incumbrance on the same property, but a case of consolidating incumbrances on two different properties.

But though a rule, even though it works what is not justice, may be established by a long series of decisions to be the rule of equity, yet when it is alleged that a rule, producing such a lamentable result exists in a particular case, the burthen of proof lies strongly on those who assert it to show that it is established either by decided cases, or by evidence of such a long continued practice as shows that there are not cases only because the rule has never been disputed.

And though I cannot doubt that the Lords Justices thought that the rule on which they acted in *Tassell v. Smith* (*) was already established, and though it is reasonable to suppose that two judges who had such long and great experience in courts of equity had grounds for so thinking, yet the discussion at your Lordships' bar has convinced me that they made a mistake.

The earliest case cited is *Pope v. Onslow* (*). In *Ex parte *King* (*), before Lord Hardwicke in 1750, that case [716] was cited as establishing that where A. had two mortgages upon different independent estates of the mortgagor, one a deficient security and the other more than sufficient, the mortgagor should not redeem the last without making good the deficiency of the other security; but the Lord Chancellor said that he was not satisfied that this was the established rule of the court. Both Hall, V.C., in *Baker v. Gray* (*), and Cotton, L.J., in the present case, say that Lord Hardwicke afterwards changed his opinion. I suppose they are right, though I have not been able to discover the case in which he said so. I have read *Titley v. Davies* (*) with attention, and it seems to me that Lord Hardwicke there thought that Titley, having an equitable mortgage on one portion of property mortgaged to Shephard, had a right, as against Shephard and all who claimed under him, to redeem the whole property; and that then, having done so, Titley, who had the legal estate in the whole, had got a right, as against both Shephard and those who claimed under him, to retain the whole till paid off his equitable mortgage, though only on the part. This, like *Brace v. Duchess of Marlborough* (*), may be unquestionable equity,

(*) 2 De G. & J., 713; 27 L. J. (Ch), 694.

(*) 2 Vern., 286.

(*) 1 Atk., 300.

(*) 1 Ch. D., at p. 494.

(*) 2 Y. & C. (Ch.), 399.

(*) 2 P. Wms., 491.

though, to say the least, questionable justice, but, as it seems to me, has nothing to do with consolidation, and indeed *Ex parte King* (*) was subsequent in date to *Titley v. Davies* (*).

It is not, however, I think, important whether Lord Hardwicke changed his opinion or not, if, as I think is the case, the rule, as far as laid down in *Pope v. Onslow* (*), has, since Lord Hardwicke's time, been recognized as the settled rule in equity.

In *Willie v. Lugg* (*), in the year 1761, the Lord Chancellor (Lord Northington) said that the principle upon which the court proceeds continued as long as the equity of redemption remains united; but, he said, "there seems also a manifest distinction between this case and the case of a purchase subject to a mortgage, for there the purchaser acquires a right to redeem that particular mortgage, and when he comes to redeem he offers to equity to pay all that his estate is a debtor for." Certainly Lord Northington [717] *was not of opinion that the equity subsequently laid down in *Tassell v. Smith* (*) then existed.

In *Jones v. Smith* (*), in 1794, Lord Alvanley, then Sir Pepper Arden and Master of the Rolls, says: "*Pope v. Onslow* (*), followed by two modern cases, has settled the point that, as against the mortgagor or his assignee, and, therefore, I must suppose, against all the creditors, if there are two legal mortgages which at law are become absolute (for that must be the principle) the mortgagee shall insist on being redeemed as to both or neither."

The two modern cases, which he cites from the Registrar's book, are *Cator v. Charlton*, 21st June, 1775 (I suppose decided by Lord Bathurst), and *Collet v. Munden* in 1786, decided by Lord Kenyon on the authority of the first. In *Cator v. Charlton*, as stated by Lord Alvanley, the different mortgages were all made whilst the mortgagor was owner of the equity of redemption of the whole; and it was insisted that the plaintiff, who afterwards purchased the equity of redemption, had at the time of his purchase notice of the other mortgages.

In *Ireson v. Denn* (*), A.D. 1786, just two years after *Jones v. Smith* (*), Lord Alvanley is reported to say, "He did not know why such a rule was ever laid down, but it had been decided by many cases that a mortgagee of two distinct

(*) 1 Atk., 300.

(*) 2 Y. & C. (Ch.), 399

(*) 2 Vern., 286.

(*) 2 Eden, 78.

(*) 2 De G. & J., 713; 27 L. J. (Ch.), 694.

(*) 2 Ves. jun., 372, 376.

(*) 2 Cox, 425.

(*) 2 Ves. jun., 372.

estates upon distinct transactions from the same mortgagor was entitled to hold both, even against the purchaser of the equity of redemption of one of the mortgaged estates without notice of the other mortgage, until payment of the whole money due on both mortgages."

But the case before him, like the cases which he mentions in *Jones v. Smith* ⁽¹⁾, was a case of two mortgages made to the same person whilst the equity of redemption belonged to the same person, who afterwards assigned the equity of redemption in one of the estates. Even if it was established that in such a case the right to consolidate would be good against the assignee, it does not seem to me to follow that it would be good against an assignee of the equity of redemption of one of the estates made whilst the two mortgages were not yet vested in the same person, still less as against one made before the mortgage of the other estate existed.

*The next reported decision is that of *White v. Hill-acre* ⁽²⁾, before Alderson, B., sitting in equity. The facts, as stated in the judgment, were that James Hillacre mortgaged Madgeon, and died leaving the equity of redemption to Thomas Hillacre in fee; at that time the mortgage was vested in Clark, and so continued till after Thomas Hillacre's death in 1815. Then Thomas, who was owner in fee of Westhay, mortgaged it to Clitsome in 1812. In 1815 Thomas died, and devised Madgeon to one set of devisees, and Westhay to another. "This," says Alderson, B., "being the state of facts, Clark in 1816 assigns to Clitsome the mortgage on Madgeon, and then, for the first time, the two mortgages are united in one person. I am of opinion that the plaintiff has no right to tack" (consolidate) "under these circumstances. The right seems to have been established upon this principle, that where a mortgagee is in possession of the legal estate in two properties as a security for money lent on them, a court of equity will not allow the person entitled to the equity of redemption to redeem either unless he redeems both, and allows the mortgagee a lien on the whole for his whole debt. But this principle manifestly cannot apply to a case where the equity of redemption belongs to different persons. Here that is so, and these persons, though volunteers as it is said, became entitled under Thomas Hillacre's will, before the assignment of the mortgage on Madgeon was made to Clitsome." Notwithstanding the observations of Lord Hatherley in *Bevor v. Luck* ⁽³⁾, I must own that Baron Alderson's judg-

⁽¹⁾ 2 Ves. Jun., 372.

⁽²⁾ 8 Y. & C. (Ex.), 597, 608.

⁽³⁾ Law Rep., 4 Eq., 537.

ment has an appearance at least of good sense, and of furthering justice, or perhaps I should say of refusing to further injustice, that to my mind is very persuasive. It is not, however, necessary in the present case to form any opinion on this point.

White v. Hillacre (*) was not cited in *Tassell v. Smith* (*), which is to be lamented, for if it had the Lords Justices would have no doubt explained why and how it was just that the purchaser of the equity of redemption of Blackacre should be under any obligation to fulfil the equities which his vendor had, after the sale, become liable to fulfil in respect of Whiteacre, with which the purchaser of the equity of redemption of Blackacre never had anything to do, 719] *for this does not, I think, evidently follow, even if it was settled that if the two mortgages had been united before the sale of the equity of redemption, so that the vendor was then liable to fulfil them, that equity should prevail. And if, as is very likely, they had said that the objections to this were not stronger than those against tacking stated in *Brace v. Duchess of Marlborough* (*), but that long settled rules ought not to be departed from, they would have had to consider whether there was any settled rule, or, indeed, any decision at all, that the purchaser of Blackacre was under any obligation to fulfil an equity of his vendor in respect of a debt first incurred after the sale of Blackacre though secured on Whiteacre, which might not even have been the property of the vendor at the time of the sale of the equity of redemption. All that appears in the report to have been said by Turner, L.J., is, that "one who comes to redeem a security cannot do so without redeeming any other security which the defendant holds upon property of his." He does not notice that the estate which the vendor pledged after he had sold the equity of redemption could in no natural sense of the words be called the property of the purchaser. And he cites no authority to show that an artificial rule was established by which it was to be treated as his. Hall, V.C., in *Baker v. Gray* (*), searched for such an authority, and found none. The Lords Justices in the present case could find none. The very experienced counsel who argued for the appellant at your Lordships' bar could find none but those on which I have already commented. And of those it seems to me that what is said by Lord Alvanley in *Ireson v. Denn* (*) is the only authority prior to

(*) 3 Y. & C. (Ex.), 597, 608.

(*) 2 P. Wms., 491.

(*) 2 De G. & J., 713; 27 L. J. (Ch.), 694.

(*) 1 Ch. D., 491.

(*) 2 Cox, 425.

Tassell v. Smith (') that has any bearing on the case, and that, I think, does not go so far as is required. I think that the doctrine of consolidation of mortgages ought not to be carried further than it has been, and that *Tassell v. Smith* (') did, at least as far as regards a mortgage made on another property, after the equity of redemption in the first mortgage had been parted with, carry it further than ever had been done before, and should not be followed.

The decree was made as it was asked for by the defendant, and *not objected to by the plaintiff, consolidating the mortgages prior to the settlement of 1838. After it had been drawn up as the parties asked, and as the court meant it to be, the defendant found reason to fear that he had, under the belief that it was for his benefit, asked for a consolidation which it would have been more prudent for him not to ask for. And he sought to set aside the whole proceedings and make the plaintiff redeem only Merrett's mortgage, as the plaintiff originally asked, not on the ground that there had been any mistake on the part of either himself or the court, but because he feared he had been injudicious. I think he should have thought of all this before, and that the Court of Appeal properly rejected his application.

There remains only the question whether the order to carry out the decree of the Court of Appeal requires amendment.

The appellant has not, I think, anything of which to complain. The order as it stands does not subject him to anything to which he ought not to be liable; or deprive him of anything to which he is entitled. But, as it is possible, though I think not probable, that the state of the accounts may turn out to be such that those who are beneficially interested in the equities of redemption of the different properties may require some further protection, I agree that the order should be varied as proposed. I entirely agree that this variation should make no difference in the costs.

LORD WATSON: I am of the same opinion with your Lordships upon all the questions raised in this appeal; and these have been so fully dealt with by your Lordships that it is not necessary for me to refer to them in detail.

Upon the most important of these questions—that which concerns the right of the appellant to consolidate, as against the plaintiffs, the mortgage of the 30th of October, 1839, I have a single word to say. The principles of equity as

(') 2 De G. & J., 713; 27 L. J. (Ch.), 694.

settled in the law of England are generally such as commend themselves at once, even to minds unfamiliar with that law; but I must confess that in the present case I have been unable to apprehend or appreciate the equitable considerations upon which the doctrine of consolidation of mort-
 721] gages, as now established, must be supposed to *rest. The doctrine appears to me to have its root in equity. If A. has separately mortgaged two estates to B., it seems to be just and reasonable that a court of equity should decline to aid A. in redeeming one of these estates, except upon condition of his paying to B. the other mortgage debt, which might be insufficiently secured. But the equitable character of the considerations which have led to the growth and development of the doctrine, as against purchasers of the mortgagor's equity of redemption, is by no means so apparent. It was argued that the doctrine has now been carried, by authoritative decision, to this limit,—that the purchaser of the equity of redemption is affected, not only by rights to consolidate actually existing at the date of his purchase, but by rights which were not *in esse* at that time. How far that proposition is well founded, it does not appear to me to be necessary to determine, because the appellant cannot succeed, upon this part of his case, unless he can carry the doctrine beyond that limit. He must show that the right of the purchaser of the equity of redemption ought to be affected by claims to consolidate arising out of acts of the mortgagor subsequent to its sale. My Lords, I am unable to understand upon what principle a vendor should be permitted to deal with and impose burdens upon an estate which has ceased to be his; and there being no authority to support the appellant's contention, except it may be the case of *Tussell v. Smith* (¹), I think that contention is unsound.

Order of the Court of Appeal of the 14th of February, 1880, varied, by reserving liberty for the respondents, or either of them, or for any of the *cestuis que trust* under the deeds of the 3d of December, 1838, and the 6th of May, 1868, respectively (in case of redemption of the mortgaged premises included in the Order by the respondent Jordan), to apply to the Chancery Division of the High Court of Justice for the addition to the Order of any further accounts and directions consequential thereon, which by reason of such redemption the

(¹) 2 De G. & J., 713; 27 L. J. (Ch.), 694.

court may think just : Orders *complained [722 of in the appeal, subject to the above mentioned variation, affirmed with costs : Cause remitted to Chancery Division.

Lords' Journals, 3d August, 1881.

Solicitors for appellant: *Bompas, Bischoff & Dodgson*, for E. & E. L. Waugh & Musgrave, Cockermouth.

Solicitors for respondents: *Waterhouse & Winterbotham*, for Winterbotham, Bell & Co., Cheltenham.

[6 Appeal Cases, 722.]

H.L. (E.), June 14, 1881.

[HOUSE OF LORDS.]

THE LONDON AND COUNTY BANKING COMPANY (Limited),
Appellants; and THOMAS RATCLIFFE, *Respondent*.

Mortgage—Deposit of Title Deeds with Bank—Banker's Lien—Loan by equitable Mortgagees after notice of Contract of Sale—Vendor and Purchaser—Lien of Unpaid Vendor.

The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer., 585) that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor :

Held, affirming the decision of the Court of Appeal, that on the principle of *Hopkinson v. Rolt* (9 H. L. C., 514) the bank had no charge on the land as against the purchaser for the fresh advances :

Held, also, that the bank had no charge upon the purchase-money :

Per LORD BLACKBURN : A purchaser of land, with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the *bank has after [723 notice of the purchase made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do.

APPEAL from an order of the Court of Appeal (*).

The action was brought against the respondent by the appellants as equitable mortgagees of certain hereditaments at Earleigh, the conveyance of which to J. W. Batten, the vendor, who was a customer of the bank, had been deposited by him with the bank as a security for the payment of his then overdrawn account, and for all money which should at any time be due from him to the bank on the general bal-

(*) Not reported.

ance of his account. Batten, with the knowledge of the bank, contracted to sell his property to the respondent, who employed the vendor's solicitor to prepare his conveyance, and afterwards paid or accounted for the purchase money to the vendor. The vendor continued to deal with the bank, but ultimately became bankrupt, with a large balance to the debit of his account. The facts were complicated, but will sufficiently appear, with the arguments, from the judgments of Lords Selborne and Blackburn. The action was tried before Bacon, V.C., who held that the rule in *Clayton's Case* (*) had no application, and by his order, dated the 10th of May, 1879, declared that the security of the bank was paramount to the title of the respondent, and that the respondent was a trustee of the premises for the bank, and gave consequential relief founded upon such declaration.

The Court of Appeal on the 24th of March, 1880, reversed the Vice-Chancellor's decision, considering the case to be within *Hopkinson v. Rolt* (*), and the rule in *Clayton's Case* (†) to be applicable, and dismissed the action with costs.

May 19, 20, 23. *Benjamin*, Q.C., *Davey*, Q.C., and *Russell Roberts*, for the appellants.

John Pearson, Q.C., and *Horton Smith*, Q.C. (*Ingle Joyce* with them), for the respondent.

Davey, Q.C., replied.

724] *Their Lordships took time to consider.

June 14. THE LORD CHANCELLOR (Lord Selborne): My Lords, the appellants in this case claim under an equitable mortgage of certain real estate at Earleigh, near Reading, given to them by one of their customers named Batten, to secure the then present and future general balance of his banking account with them. The conveyance of that estate (from a vendor to him named Spokes) was deposited by Batten with the bank; the purpose of the deposit being declared by a memorandum in writing, dated the 17th of January, 1873, by which Batten engaged to give the bank, whenever required, legal mortgages of this (and, as I collect, of other properties, the deeds or documents relating to which were also at the same time deposited); and declared, that the security should not be considered satisfied by the payment or liquidation of any sums to be thereafter from time to time due on the balance of the account, but should extend to cover all future sums which should at any time be or become due. This memorandum was afterwards can-

(*) 1 Mer., 585.

(†) 9 H. L. C., 514.

celled, and another security, in the same terms (except the date, and an unimportant variance in the description of part of the property), was signed in lieu of it, and was given by Batten to the bank, on the 17th of June, 1874. One of the questions in the case might be, whether this cancellation and substitution of 1874 did not put an end to the security of 1873, under which alone the appellants could be entitled to make any claim against the respondent. But I prefer to consider the case upon its merits, as if no such cancellation or substitution had taken place.

On the 28th of April, 1873, an agreement in writing was signed by Batten, and by the respondent (his brother-in-law), for the sale by Batten to the respondent of part of the real estate at Earleigh, comprised in the conveyance deposited with the bank. The purchase-money (£3,200) was treated as divisible into three sums; £1,500 for one part, called "Canterbury Villas;" £900 for another part, called "Woodbine Villas;" and £800 for the remaining part, called "Twyford Villas." A deposit of £25 was paid, and the 24th of May, 1873, was fixed for payment of the rest of the purchase-money, and for conveyance and completion of the purchase, *possession to be given to the purchaser as from that [725 date. Batten agreed, in the ordinary way, to make a good title, which would, of course, be a title free from incumbrances, and he was to retain all deeds and documents in his possession relating to any property other than that sold to the respondent, covenanting in the usual way for their production. The effect of this last stipulation was, that the respondent, as purchaser, could not claim the possession of the deed of conveyance from Spokes, which had been deposited with the bank, and which related to other property, as well as to that sold to him. In addition to the terms embodied in this agreement of the 28th of April, 1873, it was also stipulated between Batten and the respondent (by letters which passed between them) that two debts then due from Batten to the respondent and the respondent's wife, for sums exceeding together £800, should be set off against the purchase-money of £3,200.

The appellants and the respondent had respectively notice, the former of the contract of sale from Batten to the respondent, the latter of the appellants' security of the 17th of January, 1873. The contract and the notice of it to the appellants were (or may for the present purpose be treated as having been) contemporaneous. The amount then due to the appellants on the balance of their banking account with Batten was £1,779 6s. 7d. and of this the respondent must

be deemed to have had notice. The contract, so far as relates to Canterbury Villas, was completed, by conveyance and payment of the £1,500 apportioned to that part of the property, on the 28th of May, 1873, with the appellants' knowledge, who received £1,100 (part of this £1,500) on the 6th of June from Batten's solicitor, the remaining £400 being received, without objection from the appellants, by Batten himself. Another conveyance in fee simple of all the rest of the property agreed to be sold was also at the same time executed, and was left with Batten's solicitor until the rest of the purchase-money should have been paid (as it eventually was, in several instalments) by the respondent to Batten. The latest of these payments was made on the 11th of March, 1876, after which the conveyance from Batten was delivered up to the respondent. The appellants 726] had no notice of the execution of this conveyance, *or of any of the payments made by the respondent to Batten in respect of the property comprised in it, until some time after the last payment.

Under these circumstances it results from the decision of your Lordships' House, in *Hopkinson v. Rolt* (¹), that, as against the title of the respondent, the purchaser, under the contract of the 28th of April, 1873, no further charge on the real estate comprised in that contract could be created in addition to the balance of £1,779 6s. 7d. at that time due by any subsequent advances which the bank might make to Batten. Nor can I discover anything in the nature or terms of the appellants' security of the 17th of January, 1873, to prevent the extinction of that debt of £1,779 6s. 7d. due on the 28th of April, 1873, by means of payments afterwards made by Batten to the general credit of his banking account, upon the principle of *Clayton's Case* (²). In point of fact those payments were, before the end of the same year 1873, more than sufficient to extinguish the whole of that debt; and although, in the continuation of the account, there was always a considerable balance due to the bank, the whole debt, subsequent to 1873, was for advances later than the 28th of April, 1873. The continued possession by the appellants of the deed of conveyance from Spokes to Batten (relating, as it did, to other property besides that sold to the respondent), makes, in my opinion, no difference in the case.

Upon the statement of claim in the action, the appellants' case appears to me to be rested on grounds inconsistent with the decision in *Hopkinson v. Rolt* (¹). But a different view was presented in the argument at your Lordships' bar,

(¹) 9 H. L. C., 514.

(²) 1 Mer., at p. 585.

which it is now necessary to consider, and which I assume to be open to the appellants, notwithstanding the form of their pleading. It was insisted that the security of the 17th of January, 1873, extended to every interest which Batten, the mortgagor, had, or at any time during its continuance might have, in any part of the land to which the deposited deed of conveyance related; that although by the contract of sale it necessarily became limited, as to the land itself, to the debt of £1,779 6s. 7d. then due (and which was afterwards paid off), it continued operative against the purchase-money payable under that contract to Batten, so as [727 to bind that purchase-money (except the £400 paid with the appellants' knowledge) by all the subsequent advances from time to time made; that the respondents was bound to inquire, whether there were or were not any such subsequent advances, before he could be discharged from any part of the purchase-money by any payment to Batten; and that, having failed to make such inquiry, he is now liable to pay the money over again to the appellants, to the full extent to which advances were actually made.

The result of the appellants' contention is, to ascribe to the contract for sale of the 28th of April, 1873 (with the notice which they had of it) the effect of dividing what was before a single mortgage security, operating upon one subject and for one debt, into two distinct securities, operating upon different subjects,—upon one, for a present debt, and upon the other, for a merely possible future liability. The original security was the land, the debt secured was such balance as might happen to be due whenever the security should be put in force. But after the 28th of April, 1873, the real estate (according to this argument) continued to be a security only for the amount then due; and at the same time the personal debt from the respondent to the mortgagor, which had then for the first time come into existence, and the vendor's lien for that debt, became a security for all those future advances by which the real estate could be no longer bound.

I agree with the Lords Justices in thinking that any such prospective division of the security, any such mortgage of a subject not then in existence for further advances which the appellants were under no obligation to make, was not within the contemplation of the parties to the memorandum of the 17th of January, 1873, nor really within the scope of that instrument. When the mortgagor exercised, with notice to the mortgagee, the right which (according to *Hopkinson v.*

Roll) (') he undoubtedly possessed of selling the mortgaged estate, subject to the then existing charge of the bank, and making his own bargain with the purchaser on his own terms, and in his own way, without any concurrence of the 728] bank, a line was, in my opinion, drawn, which *was applicable to the security as a whole; and the bank could not make further advances so as to prevent or intercept (without any new agreement with Batten, or any notice to the respondent beyond that which he had of the original security) the fulfilment, in the ordinary course, of the terms of the contract between Batten as vendor and the respondent as purchaser. If the respondent had bought a mere equity of redemption, subject to the appellants' charge, and had paid off that charge, it seems to me to be quite impossible to contend that he would not have been at liberty to pay the balance of the purchase-money to his vendor without making any inquiry as to subsequent advances by the appellants. If it were otherwise, he could not be entitled, without the appellants' consent, to stipulate (as he did) that pre-existing debts due to himself and his wife from Batten, should be set off against the purchase-money. It makes (in my judgment) no difference, that, by the terms of this contract, it was Batten's duty, as between himself and respondent, to clear the estate sold from the appellants' incumbrance. In point of fact, he did so; and, indeed, he did more; the sums paid by him from time to time into the bank, after the date of the contract, exceeded the whole amount of the purchase-money received by him, from first to last, from the respondent. This would (no doubt) be immaterial to the present controversy, if the appellants had the rights which they claim; for they received those moneys (except the £1,100 paid on the 6th of June, 1873), from Batten, without knowing from what source they came. But, from the terms of the respondent's contract, of which the bank had notice, the fair and reasonable inference was, that the settlement of the purchase-money was intended to, and would, take place, according to the ordinary course between vendor and purchaser, that is, by payment to the vendor, subject to his obligation to clear the title from the then existing charge. Notice to the respondent of the security of the 17th of January, 1873, was notice of the existing charge; but it was not notice that, after the amount of that charge had been fixed once for all, as against the land, by the sale of the estate, further advances, which the appellants were under no contract or obligation to make, would

(') 9 H. L. C., 514.

voluntarily be made by them to Batten, much less that such advances would be made *upon the footing of an [729 equitable assignment to the bank of the unpaid purchase-money. Until these advances were actually made there was not, and there could not be, any existing charge for them; and even if such a charge arose as between Batten and the bank, when they were in fact made, this was not a charge of which notice by anticipation can be imputed to the respondent, or into the existence or non-existence of which he was bound to inquire. It was for the appellants, when those facts happened which (in their view) resulted in such a charge, to give notice of it.

A question not dissimilar to this arose, and was decided by this House, in the case of *Shaw v. Foster* ⁽¹⁾ to which Mr. Davey referred in his reply. There Pooley had contracted with Foster to purchase certain real estate, and had afterwards given a security by deposit of the contract, with an accompanying memorandum, to the Birmingham Banking Company. The memorandum contained (among other things) a stipulation that he would, on request, assign to them his contract with Foster. Of this security, and of the fact that it was regarded by the bank as a charge upon the property, Foster had express notice; but it was held by the Court of Appeal in Chancery, and by this House, that, not having notice that the bank had made necessary request to Pooley, on which the assignment of the contract by way of security was made contingent by the terms of the memorandum, he was under no obligation to make any inquiry on that subject, though he would have learnt (if he had done so) that the request had, in fact, been made; and that he was at liberty to convey the estate to Pooley without communicating with the bank, when the time for completion arrived. The principle of that decision seems to me to be applicable to the present case.

I am, therefore, of opinion that the judgment under appeal is right, and ought to be affirmed; and I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN: My Lords, James William Batten, a builder, was a customer of the Reading branch of the London and County Bank, and in June, *1872, deposited [730 with that branch of the bank a deed of conveyance in fee from Sir Peter Spokes subject to a fee farm rent, being the title deed of some property called Canterbury Villas, on the terms usual between bankers and their customers, and at the same time signed a memorandum of the terms of that

(1) Law Rep., 5 H. L., 321.

deposit. No question now arises as to this property, but it is necessary to mention it in order to make intelligible the transactions on which the questions in this case arise.

Batten got a conveyance, dated the 9th of December, 1871, from Sir Peter Spokes in fee, subject to a fee farm rent, which was Batten's title deed to some other land on which he subsequently built some villas; it is as to part of this land on which villas called Woodbine and Twyford Villas were erected that the questions arise.

Batten deposited this deed of the 9th of December, 1871, with the London and County Bank, and on the 17th of January, 1873, signed a memorandum of deposit. The manager of the Reading branch of the bank at a later date, the 17th of June, 1874, apparently very unnecessarily, took from Batten a further memorandum of deposit differing from that of the 17th of January, 1873, only in the date, and in adding a statement that besides the Woodbine and Twyford Villas two other villas called 1 and 2 Granby Gardens, had been built on the same property; and he, still more unnecessarily, destroyed the memorandum of deposit of the 17th of January, 1873, thinking it now useless. That memorandum when destroyed was unstamped, and an objection was below raised on the ground that being unstamped no evidence of its contents could be given, and that without evidence of its contents no case could be made for the London and County Bank. The Lords Justices permitted a copy duly stamped as an original to be read. As, notwithstanding that they received this copy in evidence, their judgment was that the action should be dismissed with costs, the respondents did not, before this House, raise any point as to the reception of this evidence; and I may say, speaking for myself alone, that it was never explained to me what the objection under the revenue laws was, nor how it was obviated by the reception of this copy. An objection was raised by Mr. Horton Smith that the destruction of the memorandum of 1873, on grounds of common law, was fatal to the case of the London and County Bank. In the view [731] which I take of the law and facts it is not necessary to form any opinion as to this objection, and as I am unwilling, in the existing state of the authorities, to say anything unnecessarily on such a point, I shall express no opinion on it either way. I merely mention it to show that it has not been overlooked.

The defendant Ratcliffe had married Batten's sister. He had, it appears, lent to Batten £400, and Batten, as executor of his father's will, had to pay to Mrs. Ratcliffe a sum

of money, which was afterwards ascertained to be £424 11s. A letter from Ratcliffe to Batten, dated the 11th of April, 1873, was put in evidence. The earlier part shows that Ratcliffe had seen Batten at Reading, and had understood from him verbally that ready money would be very useful to Batten, and that he, Ratcliffe, had promised to see what he could do. The material parts—and I think them very material—of this letter are as follows:—"I mentioned to Lucy" (his wife) "our conversation as to the property in the Avenue. She falls in with everything save the terms of *payment mentioned by you*. Her wish is that the amount I lent you (£400) and the third of residue due to her on the death of grandma, together with the sum accumulated, and, I presume, invested by you on that third portion before and since December, 1871, constitute part payment. I should not think of borrowing on mortgage more than £1,000, or, at the very most, £1,100, and would not place myself in the position to be obliged to repeat the mortgage at the expiration of five years. That would make my bargain a *dear one indeed*. I understand your position, and will do my very best, with the assistance of the £1,000 from Mr. Graham, to pay you the whole due to you (after deducting the £400 and Lucy's third of residue, &c., due to her) by the close of June next. When I get the agreement from Mr. Graham, and approve of it, I will sign and let you or Mr. Graham have (as I may be directed) a deposit of £25. You shall also have shortly after to put yourself right with the bank, besides the £1,000 from Mr. G., the sum of £800 at least. Do not forget to mention to Mr. Graham the subject of the wall. Let me have also your letter respecting the villas only very partially finished, and a full statement of grandma's affairs and suggested mode of distribution, *before the agreement is sent*. We wish that first settled."

The inference I draw from this letter is that at [732 that time Ratcliffe was quite aware that Batten wanted ready money for the purpose of improving his credit with his bankers, and that he was willing to sell the property in question to Ratcliffe, £1,000 or £1,100 of the price to be raised by mortgage which Graham (a solicitor at Newbury, who was certainly acting for Batten) had said he could find; and now Ratcliffe offered to buy on terms already verbally discussed; that the residue of the purchase-money "(after deducting the £400 and Lucy's third of residue, &c.)*" should be paid as soon as possible, for the purpose of improving his position with the bank. Ratcliffe swears that he neither then nor at any time knew that the title deeds

had been deposited with the bank, and I see no reason to doubt his assertion. I also draw the conclusion from this letter that Graham was as yet acting as solicitor for the vendor (Batten) only, and was to draw up the agreement in that capacity and send it to Ratcliffe for his approval, he, as yet, acting for himself in this matter. It is not important whether Graham was at any earlier date acting for both parties, for Ratcliffe, when he did receive and approve of the agreement, sent it, on the 28th of April, in a letter which undoubtedly made Graham his solicitor in completing the sale.

Before this it appears that Batten (and perhaps Graham) had seen the manager of the Reading branch, and he, on the 19th of April, sent the title deeds to the manager of the Newbury branch, with a request to hold them, "and let Mr. Graham arrange for the completion of their sale for £3,200." Graham, who at least after the 28th of April, was solicitor for Ratcliffe in this transaction, was perfectly aware that the deeds had been deposited with the bank on the ordinary terms that they should be a security for all moneys which should at any time be due on the general balance. Batten's account was overdrawn, and Graham, if he did not know the precise balance, could easily have ascertained it, and had at least constructive notice what was the amount.

I think, therefore, it must be taken that Ratcliffe, who had as yet only paid in cash the deposit of £25, had notice that the bank held a security for what turns out to have been on the 2d of May, which I think the important date, 733] between £1,700 and £1,900, it is *not necessary to be more precise; he had bargained that the debt of £400 and the third of Mrs. Ratcliffe's money, together £824 11s., should be taken as part payment of the £3,200, but he ought to have known (though very possibly he personally did not) that the debt to the bank was a prior charge on the land, and that whatever moneys he might pay in future to Batten would be so far thrown away unless Batten discharged it in some way or other.

Graham, on the 2d of May, 1873, wrote to the manager of the Reading branch of the London and County Bank the following letter:—"Newbury, 2d May, 1873. Batten and Ratcliffe. Dear Sir,—I received this morning the contracts signed by Mr. Batten and Mr. Ratcliffe respectively, and the 24th instant is fixed for the completion of the purchase. I have seen Mr. Gurney to-day, and have told him I will write you.—Yours truly, Charles A. Graham. J. A. Strachan, Esq." The agreement was dated the 28th of April, 1873,

and the material parts were as follows:—"The vendor agrees to sell unto the purchaser, who hereby agrees to purchase, firstly, all those two messuages or tenements with stables, outhouses, gardens, and appurtenances called 'Canterbury Villas,' situate at Earleigh, near Reading, Berks, subject to a fee farm rent of £12 per year to Sir Peter Spokes, his heirs or assigns; and, secondly, also all those two villas with appurtenances called 'Woodbine Villas,' also situate at Earleigh. And the two villas with appurtenances also situate at Earleigh, aforesaid, and called 'Twyford Villas,' subject as to the premises secondly before described to the apportioned fee farm rent of £20 payable to the said Sir Peter Spokes, his heirs and assigns. The purchase-money is fixed at the sum of £1,500 in respect of the premises firstly described, the sum of £900 for Woodbine Villas and appurtenances, and the sum of £800 for Twyford Villas, £25 part of the purchase-money to be paid down on the signing of this contract by way of deposit, and the remainder to be paid on the 24th day of May next, at the office of Messrs. Graham, Solicitors, Newbury, at which time and place the purchase is to be completed, and the said Thomas Ratcliffe shall, as from that day, be entitled to possession or the rents and profits of the said premises respectively, all outgoings up to that time being discharged by the *vendor. [734 On payment of the remainder of the purchase-money the vendor shall execute a proper conveyance of the premises unto the purchaser, such conveyance to be prepared by and at the expense of the purchaser. If from any cause whatever the purchase is not completed on the said 24th day of May next, the purchaser shall pay interest on the residue of the purchase-money from that day until completion of the purchase at the rate of £5 per cent. per annum. It is hereby agreed that the vendor shall, at his own cost, complete and finish in a workmanlike manner with good and proper materials, the villas called 'Twyford Villas,' now in course of building, and also the wall on the south side of the same villas." This last passage explains the reference to a wall in Ratcliffe's letter of the 11th of April.

The letter of the 2d of May, 1873, gave the bank distinct notice that the agreements were signed, which was the fact. It did not give the bank any notice that it was part of the bargain that £824 11s. was to be paid by way of set-off, and that Batten's vendor's lien was only good for the balance, or a little more than £2,400, which, however, was more than enough to discharge all that was then due to the bank. Even if those acting for the bank had seen the agreements

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(which I think it is not proved that they ever did) the bank would not have found in them any stipulation as to how the price was to be paid. I think it most likely that Batten had led the bank to believe that the whole £3,200 was to be paid in cash, and would pass through their hands; and it is not unlikely that Graham was not at all anxious to disabuse them of an expectation that must have tended to make them more liberal to Batten; but I see nothing tending to show that Ratcliffe at any time, or Graham, whilst acting as Ratcliffe's solicitor, did anything to foster this belief. The bank asked no questions; and I think they had no right to assume that the price was not to be paid in any way which Batten or Ratcliffe might find most convenient. But Ratcliffe had notice (through his solicitor) that the deeds were pledged, as is universally the case with deposits with banks, not only for the existing balance, which on this 2d of May, 1873, appears from the pass-book to have been between £1,700 and £1,900, but also for the general balance that might at any 735] time become due, which might be very *much larger. And the question arises what was the effect of this last notice?

The further facts necessary to raise it are briefly these. Graham procured some one to take a mortgage of the Canterbury Villas for £1,100, and I suppose had in some way or other informed Strachan that he had done so, and that this £1,100 would be forthcoming, for the three following letters passed:—“*London and County Bank, Reading, 26th May, 1873. Dear Sir,—Upon Mr. Graham paying the sum of eleven hundred pounds account J. W. Batten with this branch, be pleased to deliver to him the deeds of Canterbury Villas, retaining the deeds of Granby Gardens estate.—I am, dear sir, yours truly, John A. Strachan, manager. Thos. Gurney, Esq., London and County Bank, Newbury.*” “*Newbury, 28th May, 1873. Batten and Ratcliffe. Dear Sir,—The £1,100 is ready and will be paid to Mr. Gurney in a few days, the deeds having been sent to-day to King's Lynn for Mr. Ratcliffe's signature, preparatory to completing the purchase of Canterbury Villas. I understand that the completion, so far as Woodbine and Twyford Villas are concerned, will not take place until about the 24th of next month.—Yours truly, Charles A. Graham. J. A. Strachan, Esq.*” “*London and County Bank, Newbury, 4th June, 1873. My dear Sir,—I beg to inform you that we credit your branch this day, by Mr. Graham on account of J. W. Batten, £1,100, and have returned conveyance, Spokes to Batten, 9th December, 1871, receipt of which please ac-*

knowledge.—I am yours faithfully, Thos. Gurney. J. A. Strachan, Esq.”

From that time the Canterbury Villas estate is out of the case. And by this payment of £1,100 the balance of between £1,700 and £1,900, which was owing to the bank on the 2d of May, 1873 (which I think is the day when the bank had notice that Ratcliffe had bought the property from Batten), was reduced to between £600 and £800.

I do not think that anything is proved that amounted to notice, either actual or constructive, to Ratcliffe, or to Graham when acting as Ratcliffe's solicitor, after that date of the 2d of May, 1873; but in fact the bank continued their account with Batten, receiving payments from him and making advances to him, just as they might have done if there had been no notice of the sale *to Ratcliffe. The [736 balance on the account was never turned in Batten's favor. It is struck in the pass-book at the end of each three months. On the 1st of July, 1873, at £902 9s. 6d., that is, after credit had been given for more than £1,600 (including the £1,100) paid between the 2d of May and the 1st of July. It is again struck on the 30th of September at £1,424 17s. 3d.; that is, after giving credit for £327 19s. 3d. for moneys paid in during the three months between the 30th of June and the 1st of October. It is again struck on the 31st of December at £1,824 17s. 7d., that is, after giving credit for £957 2s. 1d. for moneys paid during those three months. It is not necessary to proceed further, for it is obvious that, if what is called the rule in *Clayton's Case*(¹) is to be applied, the old balance due on the 1st of July was wholly paid off during the two quarters ending on the 31st of December, and the balance due on the 1st of January, 1874, consisted entirely of advances made after the 30th of June, which was some time after the bank had, on the 2d of May, notice of the sale.

Ratcliffe paid to Batten at various times moneys, and gave him credit, which, in the whole, amounted to £3,200, the last of these payments being on the 11th of March, 1876, when he took from Batten this receipt: “11th March, 1876. Received from Rev. Thomas Ratcliffe the sum of four hundred and forty pounds and seven shillings and fourpence, being balance on completion of purchase of six villas (named in the conveyance deeds, Canterbury, Woodbine, and Twyford Villas), and also of all claims on account of ground rent for the aforesaid six villas up to March the 25th, 1876. J. W. Batten. £440 7s. 4d.”

(¹) 1 Mer., 585.

He made these various payments without any inquiry as to whether Batten had paid off the charge the bank had on the property, which was not imprudent on his part, as he did not personally know that such charges existed, Batten and Graham not having informed him of that fact. But it is not and could not be disputed that, notice having been given to Graham while acting as his solicitor that the charge to this amount existed at the time when notice of his purchase was given on his behalf to the bank, no subsequent payments to Batten could avail against that charge. He must show that the amount was paid to the bank. £1,100 737] was *in every sense paid to the bank on the 4th of June, 1873. The balance between £800 and £800 is only accounted for if the rule in *Clayton's Case* (1) applies. The Vice-Chancellor thought it did not. He says: "In my opinion no such principle is applicable to the case of deposit made with a banker. It has no application, because, as has been truly said, a banker's lien upon all matters deposited with him, or which come into his possession, extends over the whole of the account. When the relation of debtor and creditor subsists between the parties the lien is operative and active."

The Lords Justices were of a different opinion. Lord Justice James briefly says, "It is clear, from the bank accounts, that all that was due at that time was long since paid off." I agree with the Lords Justices. I think that the Vice-Chancellor is quite right in saying that, as between the banker and his customer, the lien is operative whenever the relation of debtor and creditor exists. If the payments made to the bank had been at any time, say during the three months from June to October, so great as for a time to turn the balance in favor of Batten, so that his account had been a solvent one, and the balance on the 1st of October in his favor, and afterwards advances had been made by the bank so great as to turn the balance the other way, it would be quite accurate to say that the lien for this new balance, as between the bank and Batten, was as effective as if the balance had never been turned; but could it then be contended that the old balance had not been discharged, or that, though Ratcliffe never had been told that the balance had for a time been turned, his property could have been held liable to make good part of the new balance, because it had been subject to a charge for that which was paid off? I take it such a contention would have been obviously untenable. And I do not see why the discharge by the

(1) 1 Mer., 585.

application of the rule in *Clayton's Case* (*) should have less effect. The bank might, if they pleased, have taken the payments on such terms as to prevent the application of that rule, but, not having done so, it seems to me that the old balance was, before the end of the year, 1873, paid off.

But this leaves the question to be determined whether, as *against the purchaser Ratcliffe, he having had notice [738 (though I think only constructive notice) that the title deeds had been pledged to the bank on the usual terms, that they should be a security for all moneys which should at any time be due upon the general balance, the bank had a security on the property, after it had become Ratcliffe's, for advances made in the ordinary way, but after they had notice that the property had become Ratcliffe's. The Vice-Chancellor, by his decree, makes Ratcliffe a trustee for all these sums. I do not think that in his judgment he clearly indicates why he so thought, but I conjecture that he recollected what at one time was believed by many practitioners to have been the law settled by *Gordon v. Graham* (†) and thought it applied to this case, and that it was not brought to his notice that a majority of this House had in *Hopkinson v. Rolt* (‡) determined, contrary to the opinion of Lord Cranworth who dissented that *Gordon v. Graham* (†) had been misunderstood, and that a mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave the mortgagee no equity to postpone advances made by a second mortgagee with notice of the first, to advances made by the first mortgagee after notice of the second mortgage. I do not inquire whether if the doctrine for which Lord Cranworth contended had been adopted by the House, and was the law as to advances by a second mortgagee, it would have applied to payments by a purchaser. I doubt it; but it being decided by this House that it was not law as to a second mortgagee, it follows, *à multo fortiori*, that it was not law as to a purchaser. In this I agree with the Lords Justices.

One more point was made at your Lordships' bar, which I think was not suggested before the Lords Justices, and, at all events, was not dealt with by them. It was said that Batten, not having been paid the whole price when he sold, still held the land as an unpaid vendor, with an unpaid vendor's lien against Ratcliffe for this unpaid amount; the sum could be afterwards ascertained, but it certainly was

(†) 1 Mer., 585.

(‡) 2 Eq. Cas. Abr., 598, pl. 16; 7 Vin. Abr., 52, pl. 3.

(§) 9 H. L. C., 514.

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considerable. And Batten could pledge this unpaid vendor's lien to the bank, and if he did so, and notice was 739] *given to the purchaser of such a pledge, the purchaser could no longer safely pay Batten, who could not give him a discharge without the concurrence of the pledgee; and in all this I agree. It was further argued that, the deeds having been deposited with the bank as a security for future advances, that did, *ipso facto*, pledge as a security for those future advances Batten's interest as an unpaid vendor which arose on the sale; and that Ratcliffe, having constructive notice of the terms of the deposit, was in the same position exactly as if he had actual notice that Batten had agreed to pledge his unpaid vendor's lien for future advances; and, in paying Batten, took the risk, not only of whether the previous advances had been paid off, but also of whether there had been any subsequent advances. This, in effect, raises the question whether any one purchasing land, with notice that the title deeds have been deposited with a bank, is bound to inquire whether the bank has, after receiving notice of this purchase, made fresh advances on the security of the unpaid vendor's lien; or whether the burden does not lie on the bank, advancing on the security of the unpaid vendor's lien, to give notice to the purchaser, that it has so done, or intends so to do. No case was cited in which any such point had been discussed; but I think both convenience and principle strongly point to the burden of giving notice lying on the bank, and not on the purchaser, whose inquiries might often be annoying and impertinent.

I am, therefore, of the opinion that the appeal should be dismissed with costs.

LORD WATSON: My Lords, I concur—I have had the advantage of considering, in print, the judgments which have just been delivered by my noble and learned friends; and I have nothing to add.

Order affirmed, and appeal dismissed with costs.

Lords' Journals, 14th June, 1881.

Solicitors for appellants: *Harries, Wilkinson & Raikes.*

Solicitors for respondent: *Ingle, Cooper & Holmes.*

As to mortgages and judgments given to secure further advances, see 2 Amer. Law Reg., N. S., 1.

A mortgage, or a judgment, may be given to secure future advances; or as

a general security for balances which shall be due from time to time, from the mortgagor or judgment debtor. And this security for future advances may be taken in the form of a mort-

gage, or judgment, for a specific sum of money, sufficiently large to cover the amount of the floating debt intended to be secured thereby.

Alabama: *Lovelace v. Webb*, 72 Ala., 271.

Arkansas: *Brewster v. Clamfit*, 33 Ark., 72.

Canada, Upper: *Sutherland v. Nixon*, 21 U. C. Q. B., 629; *Royal, etc., v. Cummins*, 15 Grant's Chy., 627; *Frazier v. Bank*, 19 U. C. Q. B., 381.

See *Mathers v. Lynch*, 28 U. C. Q. B., 354.

Indiana: *Birckmeyer v. Browneller*, 53 Ind., 487.

Iowa: *Clasey v. Sigg*, 57 Iowa, 371.

Maryland: *Brooks v. Lester*, 36 Md., 65.

Mississippi: *Witczinski v. Everman*, 51 Miss., 841.

New Jersey: *Sayre v. Hewes*, 32 N. J. Eq., 652, modified 33 id., 552.

New York: *Ackerman v. Hunsicker*, 85 N. Y., 43, reversing 21 Hun, 53; *Truscott v. King*, 6 N. Y., 147; *Robinson v. Williams*, 22 id., 380, 388 and cases cited; *Simmons v. First National, etc.*, 93 id., 269; *Merchants, etc., v. Hall*, 83 id., 338, affirming 18 Hun, 176; *Murray v. Barney*, 84 Barb., 336; *Bank v. Finch*, 3 Barb. Chy., 293; *Craig v. Tappan*, 2 Sandf. Chy., 78.

Oregon: *Hendrix v. Gore*, 8 Oregon, 406.

Texas: *Klein v. Glass*, 53 Tex., 37.

United States, Supreme Court: *National, etc., v. Whitney*, 103 United States, 99.

Where the judgment or mortgage is for a particular sum, parol evidence is admissible to show the object of the judgment or mortgage and the amount of advances upon it: *Truscott v. King*, 6 N. Y., 147; *Chester v. Bank of Kingston*, 16 id., 343; *Simmons v. First National, etc.*, 93 id., 269; *Hendrix v. Gore*, 8 Oregon, 406; *Merchants, etc., v. Hall*, 83 N. Y., 338, affirming 18 Hun, 176.

When the manner of making advances is agreed upon, a departure therefrom does not prevent the mortgage or judgment from operating as a security therefor, though admissible as affecting the *bona fides* of the transaction: *Strange v. Dillon*, 22 U. C. Q. B., 223.

Such future advances will be covered

by the lien, to the extent of the sum mentioned in the mortgage or judgment, in preference to any claim under a junior incumbrance with notice.

New York: *Simmons v. First National, etc.*, 93 N. Y., 269; *Bank v. Finch*, 8 Barb. Chy., 297; *Kendrick v. Robertson*, 2 Johns. Chy., 309; *Binkerhoff v. Marvin*, 5 id., 326; *Janes v. Johnson*, 6 id., 420.

The mortgage or judgment need not specify any definite amount. A mortgage, to save the mortgagee harmless from all liability which he has heretofore contracted to and for the mortgagor, "either as surety, indorser, guarantor or otherwise, whether now due or yet to grow due, and from all damages, costs and charges on account of the same," is valid against creditors, and is not void for uncertainty in respect to the debt or debts it is intended to secure: *Robinson v. Williams*, 22 N. Y., 380; *Youngs v. Wilson*, 27 id., 351, reversing *Youngs v. Wilson*, 24 Barb., 510, and overruling practically *Babcock v. Bridge*, 29 id., 427; *Brewster v. Clamfit*, 33 Ark., 72; *Lovelace v. Webb*, 72 Ala., 271; *Witczinski v. Everman*, 51 Miss., 841.

See *Truscott v. King*, 6 N. Y., 161; *Dow v. Platner*, 16 id., 562.

Though such a mortgage calls for written evidence of the indebtedness secured: *Walker v. Payne*, 31 Barb., 213.

The docketing of a judgment is not, under the registry laws, constructive notice to the mortgagee of its existence: *Ackerman v. Hunsicker*, 85 N. Y., 43, reversing 21 Hun, 53.

A mortgage, duly recorded, given to secure future indorsements or advances, has a preference over subsequent judgments against the mortgagor, as well as to indorsements or advances made upon the faith thereof subsequent to the rendition of the judgments, without notice thereof as to those previously made; and this without regard to the question whether the indorsements or advances were optional or obligatory: *Ackerman v. Hunsicker*, 85 N. Y., 43, reversing 21 Hun, 53.

See also *Ketchum v. Wood*, 23 Hun, 64.

It seems that the record of a mortgage to secure future advances is notice to subsequent purchasers and incum-

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brancers; they are put upon inquiry to ascertain to what extent advances or indorsements have been made, and by notice may prevent others to their prejudice: *Ackerman v. Hunsicker*, 85 N. Y., 43, reversing 21 Hun, 53; *Sayre v. Hewes*, 32 N. J. Eq., 632, modified 33 id., 552; *Rolt v. Hopkinson*, 3 De Gex & Jones, 177 (and cases cited in note to Perkins's ed.), affirmed 9 H. L. Cas., 514; *Menzies v. Lightfoot*, L. R., 11 Eq., 459, 466; *Hull v. Crouse*, 13 Hun, 557.

See also *Ketchum v. Wood*, 32 Hun, 64; *Dawson v. Bank of Whitehaven*, 20 Eng. R., 805.

Where, at the time a mortgage to secure future advances is given, the mortgagee becomes bound to make such advances, when made they relate back, and such mortgage will be a valid lien therefor, against subsequent purchasers or incumbrancers, with either actual or constructive notice of such mortgage: *Brinkmeyer v. Browneller*, 55 Ind., 487.

Where there is no obligation on the part of such mortgagee, and such advances or liabilities are merely optional with him if he make such advances, or incur such liabilities, with notice that the mortgaged property has been purchased by or incumbered to another, the latter is not bound by such mortgage: *Brinkmeyer v. Browneller*, 55 Ind., 487.

A judgment entered on a bond conditioned that the obligor will pay to the obligee the sum of all notes, checks, drafts, and obligations of every kind or nature which B. has incurred or assumed, or may hereafter incur or assume, to a certain bank, is a lien for future advances as against intervening incumbrancers only from the date of such future advances, and not from the date of the judgment: *Kerr's Appeal*, 93 Penn. St. R., 236, following *Bank of Montgomery's Appeal*, 86 id., 120.

Where a mortgage is given to secure a particular debt, it will secure a renewal of the same debt, unless the renewal paper be expressly accepted in payment of the debt secured.

Canada, Upper: *Frazer v. Bank of Toronto*, 19 U. C. Q. B., 381; *Burnham v. Burnham*, 10 Grant's (U.C.) Chy., 485; *Gore Bank v. McWhorter*, 18 U. C. Com. Pl., 298.

Georgia: See *Rice v. Georgia*, etc., 64 Geo., 173.

Iowa: *Sloan v. Rice*, 41 Iowa, 465; *Hiveley v. Matteson*, 54 id., 505.

Kentucky: *Burdett v. Clay*, 8 B. Monr., 287.

Maryland: *Flanagin v. Hambleton*, 54 Md., 222.

Massachusetts: *Pomroy v. Rice*, 16 Pick., 22; *Watkins v. Hill*, 8 id., 522; *Davis v. Maynard*, 9 Mass., 242.

Mississippi: *Gleason v. Wright*, 53 Miss., 247.

Missouri: *Christian v. Newberry*, 61 Mo., 447; *Lippold v. Held*, 58 id., 213.

New York: *Hill v. Beebe*, 13 N. Y., 556; *Merchants, etc., v. Hall*, 83 id., 398, affirming 18 Hun, 176; *National, etc., v. Bigler*, 83 N. Y., 51-2; *Bank v. Finch*, 3 Barb. Chy., 293; *Chapman v. Jenks*, 31 Barb., 164; *Sterling v. Burdick*, 25 Wend., 657.

See *Farneys, etc., v. Lang*, 87 N. Y., 209, reversing 22 Hun, 372, 10 N. Y., Weekly Dig., 574.

So if parties intended the renewal to operate as payment or to extinguish the original indebtedness: *Butler v. Miller*, 1 N. Y., 496, questioning *Butler v. Miller*, 1 Denio, 407.

Ohio: *Dayton, etc., v. Merchants, etc.*, 37 Ohio St. R., 208; *Nesbit v. Worts*, id., 378.

Pennsylvania: *Galt v. McGrath*, 33 Penn. St. R., 392; *Shrewsbury, etc., Appeal*, 94 id., 309, 37 Leg. Int., 418, 9 Weekly notes (Penn.), 166.

United States, Circuit and District: *Matter of Wynne, Chase's, Dec.*, 237.

If part be paid, the security will stand for the balance: *Dayton, etc., v. Merchants, etc.*, 37 Ohio St. R., 208; *Gleason v. Wright*, 53 Miss., 247.

Under a mortgage to secure certain notes and the renewals of those notes from time to time, it was held that in order to constitute notes subsequently issued, *renewals* of original notes, it is not necessary that they should have been issued for the same amounts, at the same periods, and that each successive note should have been applied to take up its immediate predecessor. A continuing loan of the same credit, by the issue of new notes, from time to time, would, in such a case, be within the terms of the mortgage; and such notes would be secured by it: *Galt v. McGrath*, 33 Penn. St. R., 392.

So if money be raised on other notes

at other banks for payment of notes specified: *Burnham v. Burnham*, 10 Grant's (U.C.) Chy., 485; *Nesbit v. Worts*, 37 Ohio St. R., 378.

Where security is given for the payment of a note or a *single* renewal, it has been held it did not secure the debt after such single renewal. In such case, where the note was renewed twice, the lien even if good between the parties to it, by an agreement to that effect, is postponed to the lien of a creditor before the second renewal: *Morehead v. Duncan*, 83 Penn. St. R., 488.

Where a judgment or mortgage is given to secure future advances, and such advances are made to the amount thereof, and afterwards paid by the debtor, the security, as against subsequent incumbrances, is *functus officio*, and cannot stand as continuing security for future advances, or for a final balance of a current account between the parties: *Truscott v. King*, 6 N. Y., 147; *Monot v. Ibert*, 88 Barb., 24.

See *Thompson v. Van Vechten*, 6 Bosw., 406, reversed 27 N. Y., 568.

A parol agreement that a mortgage for \$200 shall stand as a security for a further advance, is void even though the bond be altered and enlarged to include such sum. Nor after payments be once applied thereon can the application be changed: 13 Eng. R., 616 note; 16 id., 276 note; *Peck v. Minot*, 4 Rob., 848; *Stoddard v. Hart*, 28 N. Y., 556; *Cromer v. Cromer*, 29 Gratt., 280; 1 Vir. L. J., 679; *Winans v. Wilkee*, 41 Mich., 264; *Sims v. Mead*, 29 Kans., 124; *Emory v. Keeghan*, 94 Ills., 543; *Blenn v. Lyford*, 70 Maine, 149; *York, etc., v. Roberts*, Id., 384; *Crocker v.*

Whitney, 71 N. Y., 161, reversed on another point, 108 U. S., 99; — v. —, 2 Ont. R., 84; *Taylor v. Post*, 30 Hun, 406, 18 W. Dig., 11.

But see *Love v. Sortell*, 124 Mass., 446; *Townsend v. Stone*, etc., 6 Duer, 208.

But see, as between the parties, *Ingalls v. Gilchrist*, 10 Grant's (U.C.) Chy., 801; *Coles v. Appleby*, 22 Hun, 72, 87 N. Y., 114.

Although it is well settled that a chattel mortgage may be given to secure the mortgagee for future advances to be made to, and responsibilities incurred for the benefit of the mortgagor, yet where a mortgage is given by a partnership for that purpose, it cannot be made effectual to protect advances made to, or liabilities incurred for their successors, after a dissolution of the firm: *Monot v. Ibert*, 88 Barb., 24.

Though a mortgage to secure a firm against indorsements, will secure the firm for indorsements made after the withdrawal of a secret partner: *Buffalo, etc., v. Howard*, 85 N. Y., 500.

Where no specific application is made by the parties, of payments upon a *running account*, they will be applied in equity upon the first items of indebtedness, although the creditor may have held security for the payment of those items, and none for the final balance of the account: *Truscott v. King*, 6 N. Y., 147; *Cushing v. Wyman*, 44 Maine, 121; *Worthley v. Emerson*, 116 Mass., 874; *Moore v. Gray*, 22 La., Ann., 289.

See *Peck v. Minot*, 4 Rob., 828, 3 Abb. Dec., 465; *Fassett v. Smith*, 29 N. Y., 252.

[6 Appeal Cases, 740.]

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[HOUSE OF LORDS.]

740] *CHARLES DALTON, *Appellant*; and HENRY ANGUS & Co., *Respondents*.

THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS, *Appellants*; and HENRY ANGUS & Co., *Respondents* (*).

Easement—Support of House by adjoining Soil—Prescription—Prescription Act, 2 & 3 Will. 4, c. 71, s. 2—Principal and Agent or Contractor—Liability of Principal for Acts of Contractor.

A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.

Semle, per LORD SELBORNE, L.C.: Such a right of support is an easement within the meaning of the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

Two dwelling houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment.

More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory:

Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury.

Bower v. Peats (16 Eng. R., 374) approved.

THESE were two appeals from a judgment of the Court of Appeal.

741] *The action was brought by Angus & Co. against Dalton and the Commissioners of Her Majesty's Works and Public Buildings for damages in respect of injuries to the plaintiffs' coach factory, and was tried before Lush, J., at the Newcastle Summer Assizes, 1876. The facts proved at the trial are stated in the judgments of Lush, J., and Cockburn, C.J. (*), and of Thesiger and Brett, L.J.J. (*). For the

(*) Affirming 28 Eng. R., 706, reversing Id., 80.

(*) 3 Q. B. D., 85; 28 Eng. R., 80.

(*) 4 Q. B. D., 162; 28 Eng. R., 706.

present report the facts stated in the headnote suffice. Lush, J., at the trial, directed the jury to find a verdict for the plaintiffs for the damages claimed, subject to a reference as to the amount. The Queen's Bench Division (Cockburn, C.J., and Mellor, J., *diss.* Lush, J.), ordered judgment to be entered for the defendants⁽¹⁾. The Court of Appeal (Cotton and Thesiger L.JJ., *diss.* Brett, L.J.), reversed this judgment, and ordered that the defendants should elect within fourteen days whether they would take a new trial, and, if they did not so elect, that judgment should be entered for the plaintiffs for £1,943, the damages assessed by the special referee, but without prejudice to the defendants' proceedings in reference to the amount of damages⁽²⁾. Upon the appeals the following counsel appeared :

Sir F. Herschell, S.G., and *Wheeler*, for the appellant Dalton.

Sir J. Holker, Q.C., *Shield*, and *A. E. Gathorne Hardy*, for the appellants the commissioners.

Littler, Q.C., *Gainsford Bruce*, and *E. Ridley*, for the plaintiffs, respondents.

The appeals were first heard Nov. 13, 14, and 17, 1879. In pursuance of an order of the House they were again heard Nov. 18, 19, 22, and 23, 1880, in presence of the following judges: Pollock, B., Field, Lindley, Manisty, Lopes, Fry, and Bowen, JJ., to whom the following questions were put :

1. Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land ?

*2. Is the period during which the plaintiffs' house [742 has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient ?

3. If the acts done by the defendants would have caused no damage to the plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support, after the lapse of twenty-seven years, an actionable wrong ?

4. If so, is it sufficient to prove knowledge or notice of the fact that such alterations were made, or is it necessary also to prove knowledge of their effect, in causing the buildings

(1) 3 Q. B. D., 85 ; 28 Eng. R., 80. (2) 4 Q. B. D., 162, 204 ; 28 Eng. R., 706.

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so altered to require a degree of lateral support from the adjoining land which was not before needful?

5. Was the course taken by the learned judge at the trial, of directing a verdict for the plaintiffs, correct, or ought he to have left any question to the jury?

The judges desired time to consider, and on the 17th of March, 1881, delivered the following opinions:

POLLOCK, B.:—My Lords, in answering the first question, it is necessary to bear in mind that it is not affected by any of the modern statutes whereby a prescriptive right can be gained by effluxion of time or by enjoyment; nor do I think that any useful arguments can be adduced by way of analogy from such statutes. It appears to me, however, that by a long series of decisions, and by the opinions expressed by learned judges during a period extending over very many years, the common law affecting this question must be taken to have been settled in favor of the right. The right to lateral support of soil by adjoining soil is a natural right which exists wherever the lands of adjoining owners are in contact. The grounds upon which it is based are fully explained in the cases of *Humphries v. Brogden* (1) and *Rowbotham v. Wilson* (2). Where the soil is incumbered by buildings it is obvious that a different question arises, although the character of the rights when acquired is in each case the same. I will now proceed to notice those cases and *dicta* which in my judgment establish the conclusion at which I have arrived.

The earliest case which has any bearing upon the question is that of *Slingsby v. Barnard* (14th James I.) (3). The court gave judgment in favor of the right of support, although the house in respect of which it was claimed was not an ancient house, but had been 743] only recently built. This, although not referred to, *must be considered to have been overruled by the case which followed it of *Wilde v. Minsterley* (15 Charles I.) (4), where it is said, "If A., seised in fee of copyhold land next adjoining land of B., erect a new house on his copyhold land, and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself that he built his house so near to the land of B.; for he could not by his act hinder B. from making the most profitable use of B.'s own land." The cases are not of much value as establishing any principle, but they are not unimportant as showing that the attention of the courts was called to the question at this early date, and as thereby affecting the value of more recent decisions. *Palmer v. Fleshees* (15 Charles

(1) 12 Q. B., 739.

(2) 8 E. & B., 123.

(3) 1 Roll. Rep., 430.

(4) 2 Roll. Abr., 564, tit. Trespass I, pl. 1.

II.) (1), cited in Comyns' Digest (2), was an action for the obstruction of the plaintiff's lights; but the judges in their first resolution say "that if a man, being seised of land leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for every one may deal with his own to his best advantage, but *semble*, that it would be otherwise if the wall or house were an ancient one." In *Stansell v. Jollard* (1803), Lord Ellenborough directed the jury that "where a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy to the rule as to lights, &c., he has acquired a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor cannot dig so near as to remove that support; but it is otherwise of a house newly built." This case is referred to in Selwyn's *Nisi Prius*, 9th edition, upon the authority of Lawrence, J., also by Mr. Smith in his *Leading Cases* in the notes to *Ashby v. White* (3), and by Mr. Gale in his work on *Easements* as from a manuscript note (4). In *Hide v. Thornborough* (1846) (5), Parke, B., cited *Stansell v. Jollard* as law, and ruled that if there were twenty years enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support. Both these cases were cited as authorities by Lord Campbell in *Humphries v. Brogden* (6). In *Wyatt v. Harrison* (1832) (7), the plaintiff, who claimed a right of support to his house was held to fail, because it was not an ancient house; but Lord Tenterden in giving judgment says: "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according to the authorities, the plaintiff is not entitled to recover." *Part-* [744
ridge v. Scott (1838) (8), was a case in which the plaintiff claimed a right to support for two houses. As to one of these, it was not an ancient house, and the court, therefore, decided against the right claimed. As to the other, it had been built by the plaintiff on ground which had been so excavated as not to afford sufficient support to the house; and, therefore, as was said by the court, the plaintiff had caused the injury to himself without any fault on the part of the defendants. The judgment, however, of the court, which was delivered after consideration, is of importance, because, as is

(1) 1 Sid., 167.

(2) Action on the Case, Nuisance C.

(3) 1 Sm. L. C., 8th ed., p. 806.

(4) 5th ed., p. 371.

(5) 2 Car. & Kir., 254.

(6) 12 Q. B., 749.

(7) 3 B. & Ad., 875.

(8) 3 M. & W., 220.

noticed by Thesiger, L.J., in his judgment below, it affirmed in substance two propositions : first, that the second house, being an ancient house, would, but for the excavation of the soil upon which it stood by the plaintiff himself, have acquired an easement of support by virtue of an implied grant ; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. In *Humphries v. Brogden* (1850) (1), the question of disputed right was between the occupier of land unbuilt on and the occupier of subjacent minerals ; but in the considered judgment of the court delivered by Lord Campbell, he reviews the authorities which relate to the right of support gained by houses, and referring to the cases of *Stansell v. Jollard* (2) and *Hide v. Thornborough* (3), distinctly lays it down that "where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house." In *Gayford v. Nicholls* (1854) (4), the plaintiff's houses being modern, they had gained no right of support, but in giving judgment Parke, B., assumes that had they stood for twenty years it would have been otherwise, for he says, "This is not a case in which the plaintiff has the right of the support of the defendant's soil, by virtue of a twenty years occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner, for, unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbor who causes the damage by the proper exercise of his own right." In *Robotham v. Wilson* (1857) (5), the Queen's Bench, Exchequer Chamber, and your Lordships' House were all of opinion that the question of general right was excluded by reason of both plaintiff and defendant claiming under predecessors whose rights were governed by the express terms of an award ; but the questions before the court involved the right to the support of houses by adjacent land, and in dealing with this some of the judges seem to have considered the existence of such a right after a house has stood for twenty years as settled law. I shall have occasion to refer to what they say more fully when considering the mode in which such a right is acquired. In *Rogers v. Taylor* (1858) (6), a right similar

(1) 12 Q. B., 749.

(4) 9 Ex., 708.

(5) 1 Selw. N. P., 11th ed., p. 457.

(6) 6 E. & B., 598; 8 E. & B., 123; 8

(7) 2 Car. & Kir., 260.

H. L. C., 348.

(8) 2 H. & N., 828.

to that claimed by the plaintiff in the present case was alleged in the declaration and denied by the plea. At the trial the late Lord Chief Justice Cockburn told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it, and that the jury must presume that the additional burden was put upon the plaintiff's land by the assent of the adjoining owner, and a grant by such owner of a right of support. He left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years. The jury found that the plaintiff had enjoyed the right of support for his house on the foundations on which it stood without interruption for twenty years. This finding was treated as a verdict for the plaintiff, and both the ruling and the verdict were upheld by the Court of Exchequer, upon the ground that the plaintiff's house had stood for more than twenty years.

The most recent and the most important of the decided cases bearing upon the subject is undoubtedly that of *Bonomi v. Backhouse* (1858) (1), which came before the Court of Queen's Bench upon the argument of a special case, whereby it appeared that certain messuages and buildings in the declaration mentioned had been in existence for more than forty years without sustaining injury, that they were firmly supported by mines, earth and soil underground contiguous and near to and under the land of the plaintiffs, and that the defendant who had become the occupier of coal mines under and immediately adjoining the plaintiffs' buildings, had so worked the coal as to remove pillars under land distant about 280 yards from the plaintiffs' property, whereby the roof of the defendant's mine fell down and subsided so as to produce a thrust, the effect of which gradually extended laterally to the land upon which the plaintiffs' houses were built and whereby they were ultimately let down and injured. The main question, which was decided by the Exchequer Chamber and by your Lordships' House (2) in favor of the plaintiff, was that with reference to the Statute of Limitations the plaintiff's right of action accrued not when the coal was extracted by the defendant from underneath his own land, but when the plaintiffs' buildings were first injured. The plaintiff's right of support for his buildings was however clearly raised by the case as stated, and was considered and dealt with by the judges who heard the arguments and also by some of the noble and learned Lords before whom the appeal came in this House. Wightman, J., in the Court of Queen's Bench, says: "Upon consideration of all the cases, it appears to me that the cause of action, in such a case as the present, is founded upon a breach of duty on the part of the defendant by so using his own property as to injure that of his neighbor, and not upon any right of the plaintiffs to an easement in, upon, or over the land of their neighbors. Where ancient buildings are standing upon the plaintiffs' land, the defendant must take care not to use his own

(1) E. B. & E., 622.

(2) 9 H. L. C., 503.

land in such a manner as to injure them. The language used in 746] *some of the cases is not very clear, but it appears to me that the cases of *Wyatt v. Harrison* (1); *Chadwick v. Trower* (2) in Exchequer Chamber, reversing the judgment of the Common Pleas in *Trower v. Chadwick* (3); *Partridge v. Scott* (4); *Roberts v. Read* (5); and the older cases of *Slingsby v. Barnard* (6); *Aldred's Case* (7), and the opinions expressed by the judges in giving their judgment in the case of *Rowbotham v. Wilson* (8) in the Exchequer Chamber affirming the judgment of the Queen's Bench in *Rowbotham v. Wilson* (9) in the Exchequer Chamber at the sittings after last Trinity Term, are authorities to show that the right claimed by the plaintiffs is not a right founded upon the presumption of a grant or easement, but is the common right of an owner of land not to be injured in his property by the way in which the defendant uses his, according to the two maxims of the law, '*Prohibetur ne quis faciat in suo quod nocere possit alieno*,' and '*Sic utere tuo ut alienum non ledas*.'" Willes, J., in delivering the judgment of the Court of Exchequer Chamber, said: "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river or of air: *Rowbotham v. Wilson* (8); though there may be cases in which it would be sustained as matter of grant (see the *Caledonian Railway Company v. Sprot* (10), whilst the latter must be founded upon prescription or grant, express or implied, but the character of the rights, when acquired, is in each case the same." In the House of Lords the plaintiffs' right to recover, subject to the Statute of Limitations, seems to have been taken for granted, and that the interference with the house, as well as with the land, was present to the minds of the noble and learned Lords who were present, is obvious from what fell from them. Lord Westbury, L.C., in giving judgment, says, "I think it is abundantly clear, both upon principle and upon authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises." Lord Cranworth also said, "It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth, his right is a right to the ordinary enjoyment of his land." And Lord Wensleydale adds, "I think it is perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighboring property not to interrupt that enjoyment."

If these cases and *dicta* are dealt with individually, and subjected to a close criticism, many of them are no doubt open to objections

(1) 3 B. & Ad., 871.

(2) 6 Bing. N. Cas., 1.

(3) 3 Bing. N. Cas., 334.

(4) 3 M. & W., 220.

(5) 16 East, 215.

(6) 1 Roll. Rep., 430.

(7) 9 Co. Rep., 57, b.

(8) 8 E. & B., 123.

(9) 6 E. & B., 593.

(10) 2 Macq., 449.

such as that in some the facts are not so fully stated as might now be desired ; in others, the exact character of the legal right said to be affirmed and the mode of its acquirement are not fully or accurately dealt with, nor is the right always based upon the same grounds. But in considering these objections, it must be remembered that the *difficulties presented are essential to the gradual growth and development of all our unwritten law, of which this is only an instance, and further, that the enjoyment of every right which is established not by statute but by a long course of judicial decisions and *dicta*, would be open to attack if such a remark were allowed unduly to prevail. The substance and practical effect, therefore, of all that has gone before must be kept in view, especially in a case in which it is obvious that, having reference to the subject-matter with which the courts were dealing and to the rights of the parties affected, the law laid down from time to time must have practically influenced the position of all who were interested in buying, selling, leasing, or building upon land within or near to towns and elsewhere wherever the land was available for building purposes, all of whom might well act and in many cases must have acted upon the supposition that they had acquired rights in accordance with the law so expounded.

Two points relating to this part of the cases were strongly urged on behalf of the defendants. First, it was said that the right which is claimed in the present case for the support of a house had never been treated as a natural right, such as exists where soil unbuilt on is supported by the soil of an adjoining owner ; and, secondly, that failing any natural right, there are only three modes known to the law whereby such a right can be created, namely, by express grant, by prescription evidenced by acquiescence, or by an implied grant, the latter of which has commonly been presumed in those cases in which the right claimed has been long enjoyed. These two questions may properly be dealt with together, because, in truth, the considerations which affect the nature of the right, and the mode by which it may be acquired in law are necessarily interwoven ; and here it may be well to advert to the language used by Lush, J., in his ruling at the trial of this case, where he does not lay down that the right claimed by the plaintiff is a natural right, as in the case where soil is supported by soil, but he uses this language : " I think it has become absolute law that where a building has stood for twenty years supported by adjacent soil, it has acquired a right to the support of the soil." On behalf of the plaintiff it was argued before your Lordships that this must be taken as a rule of law not resting upon fiction or upon implied grant, but as a right of property, namely, an enjoyment of support which after twenty years becomes indefeasible in the same manner as the occupier of land may, by bare possession for a sufficient period of time, acquire a good title ; and further, that the right which is acquired by the plaintiff as attaching to his house is a right which restricts his neighbor, not from using or moving his own land, but from so using or moving it as to injure the

In answer to the third question, I say that it is not necessary to prove that the defendants or their predecessors in title had knowledge or notice of the alterations, in order to make the injury to the plaintiffs' building by removing the lateral support after the lapse of twenty-seven years an actionable wrong. The alterations made by the plaintiffs in 1849 amounted merely to the conversion of that which had been a dwelling house into a coach factory, and no evidence was adduced to show that these alterations had been done otherwise than openly, and in the usual manner of building applicable to such an object. It appears to me, therefore, that what was done by the plaintiffs was that which they might lawfully do for the purpose of improving their premises and using them in the manner most advantageous to their business : and that, therefore, the relations between themselves and the defendants in respect to such alterations and any additional weight or further onus upon the defendants occasioned by them, are to be looked at in precisely the same light as if the building of the plaintiffs had been originally constructed as a coach factory, and not as a dwelling house ; or as if in 1849 the plaintiffs had pulled down their dwelling house and built a coach factory on its site ; or as if there having been no dwelling house or building until 1849 the plaintiffs had built for the first time a coach factory in the form in which it stood after the alterations that were made by them at that date. Under these circumstances it becomes unnecessary for me to deal with the arguments which were addressed to your Lordships' House at the bar, arising out of the distinction which was taken between the original dwelling house and the alterations that were made in 1849.

The mode in which I have answered the third question renders it unnecessary for me to answer the fourth question.

In conclusion, I answer the fifth question submitted to us by your Lordships by saying that the course taken by the learned judge at the trial of directing a verdict for the plaintiffs was correct, and that he ought not to have left any question to the jury. Had any question been raised by the defendants at the trial with regard to the facts which were given in evidence, it would have been the duty of the learned judge to take the opinion of the jury upon these facts, 759] *but no such question was raised, and the facts were substantially admitted by both sides. Under these circumstances the only matter which remained for decision was, what was the proper legal result of those facts ; and, assuming the view which I have taken to be right, the course adopted by the learned judge of directing a verdict for the plaintiffs was correct and in accordance with what has usually been done by judges on similar occasions, with this exception, that instead of resorting to fiction and directing the jury that they ought to find a lost grant of support as a matter of fact, Lush, J., told them that the plaintiffs were entitled to the verdict as a matter of law, and directed them to find accordingly.

FIELD, J. :—My Lords, I answer your Lordships' first question in the affirmative. I think that the owner of a building, who has un-

interruptedly enjoyed the support of it by the adjacent land of his neighbor for the period required by law to make it an "ancient" building, has acquired a right to the degree of support thus afforded, and that its absolute withdrawal so as to cause injury to the building is an actionable wrong. I also think that this right rests upon uninterrupted enjoyment and does not require for its foundation any actual or implied grant or covenant by the adjoining owner. The right seems to me to arise thus: So soon as the surface of the land becomes divided, either vertically or horizontally, into separate and exclusive tenements, one of the first and clearest principles applicable to each separate holding is, that the owner has the right given to him by implication of law to use his property as best he likes, provided that he does not by such user injure the rights of his neighbor. If neither he nor his neighbor have built on or dealt with their respective portions, and the latter are in their natural state and condition, it is clear that each owner has as against the other a right to have his soil supported by the soil of his neighbor, whether adjacent or below; and any act done by one which destroys that support so that the land of the other falls is an actionable wrong, and that is so, although the act complained of is not done by him maliciously, but simply in the exercise of his own right to use his own property. Although, therefore, either of them may dig in his own soil as deep and as near to his own boundary or to the surface as he chooses, this right is subject to one limitation from the very first, viz., that he cannot dig so deep and so near as to cause his neighbor's land to sink, unless he substitute some other sufficient support: *Wilde v. Minsterley* (1); *Humphries v. Brogden* (2); *Rowbotham v. Wilson* (3). This limitation, however, upon his right is accompanied by a like limitation of his neighbor's right, so that the advantage and burden are mutual in quality, although they may vary in degree.

It is clear that these rights and burdens come into existence by implication of law at the very moment of severance. They are unquestionably known as "natural rights," and require no age to ripen them. The same origin is, I think, to be ascribed to rights and burdens of a similar character existing in respect of flowing water. It happens that land allotted in severalty is bounded by a natural river, and when that is the case the implied terms are imposed upon the owner of that land and upon all other owners of other lands bounded by the same *stream, that each one is entitled to have the [753 flow continue in its natural course and channel for the natural use and benefit of all, and is subject to the like burden of not interfering with that flow to the prejudice of any. Besides and in addition to these rights the owner of the land in its natural state has also of course the absolutely necessary enjoyment of the free passage of light and air in its natural state over and from his neighbor's land to and over his own. But unlike the right of support of soil by soil

(1) 2 Roll. Arb., 564, Trespass I, pl. 1.

(2) 12 Q. B., 739.

(3) 8 H. L. C., 348.

and of the flow of water in a defined course, the owner in the case of light and air has originally no right of enjoyment which can prevail against his neighbor's right to make any use of his land he may like, although such use will interfere with the natural transmission of the light and air. But if the owner of the land wishes to erect a building with openings for the admission of light and air he may proceed to do so by building (as he has a right to do) his wall with the windows in it close to the very verge of his own land, so that it owes of necessity its support in part to the neighbor's adjacent soil, and the windows receive their light and air directly from it. He has thus taken into his own enjoyment and, as it were, into his own occupation the soil of his neighbor, and also the light and air transmitted to him by his neighbor by a confinement and enjoyment of it in a particular definite channel. But although his doing this is a perfectly lawful act requiring no grant, license, or assent from the adjoining owner, it does not at first confer any right as against his neighbor, either of support of the wall or of transmission of light or air, or impose any burden in those respects on his neighbor. The latter may at first and until the lapse of a definite period of enjoyment use his own soil by digging or otherwise, or build a wall up to the very edge of his own ground, notwithstanding that by so doing respectively he causes his neighbor's building to fall or obstruct the passage of the light and air through the window. Neither building nor window has yet become "ancient." For these propositions I refer to *Palmer v. Fleshees* (1); *Wyatt v. Harrison* (2); *Partridge v. Scott* (3). But if he do not by some act of interruption prevent it, the open continuance of this enjoyment by the adjoining owner for the requisite period of time, makes the building or windows to be "ancient," and converts the *de facto* enjoyment into a right, an injury to which thenceforth by any use of the neighbor's land is an actionable wrong. Interruption of the enjoyment is the only mode by which the acquisition of this right can be prevented; nothing short of it is of any avail, and no actual assent is required to convert the lawful enjoyment into a right. This is laid down by Bayley, J., in *Cross v. Lewis* (4), and by Littledale, J., in *Moore v. Rawson* (5).

These propositions are the result I think of the authorities cited and analyzed by my Brother Pollock in the opinion which he has just expressed to your Lordships. I do not propose to go through those authorities in detail, but merely to add such observations as seem to me to support the conclusion at which he and I have arrived. As was remarked by the late Lord Chief Justice in his judgment below, the cases to be found in the books relating directly to the right of lateral support of "building" by adjacent "soil" are 754] comparatively few, but there are *found in the books a vast number of authorities in reference to other rights of a more or less

(1) 1 Lev., 122; 1 Sid., 167; 1 Keb.,

626.

(2) 3 B. & Ad., 871.

(3) 3 M. & W., 220.

(4) 2 B. & C., 686.

(5) 3 B. & C., 339.

analogous character which seem to me to bear upon the question. Those authorities may be divided generally into four classes according as they relate to: (1st.) Vertical or lateral support of land or buildings; (2d.) Light and air; (3d.) Water; and (4th.) Way or common, or rights of that nature. In the cases relating to the rights of the first class, I find it clearly laid down that by the uninterrupted enjoyment in fact of lateral support of an "ancient" building the right to the support is acquired. In *Wilde v. Minsterley* (1), and in *Palmer v. Fleshees* (2), the words used to cover the existence or non-existence of the right are "ancient" or "new" message, and I find the proposition stated, substantially in the terms which I have used, by Lord Ellenborough in *Stansell v. Jollard* (3), by Parke, B., in *Hide v. Thornborough* (4), and again in *Gayford v. Nicholls* (5); by Cresswell, J., and Bramwell, B., in *Rowbotham v. Wilson* (6), and lastly and most elaborately and unequivocally in the judgment of Wightman, J., in *Bonomi v. Backhouse* (7), in which he distinctly treats the actionable wrong in such a case as founded upon the breach of duty in one man's using his property so as to injure that of his neighbor; not as founded on any presumption of grant or easement, but the common right of an owner of land not to be injured in his property by the wrong of his neighbor. In this view Campbell, L.C.J., and Coleridge and Erle, JJ., all concur, and I conceive it to have been the view entertained by some of the noble and learned members of your Lordships' House who advised the House upon the judgment of the appeal (8). I am well aware that it has been doubted whether this assertion of the law in the last case is to be considered as an authority applicable to the one now before your Lordships, but I am unable to share in that doubt for the reasons stated by my Brother Manisty.

Besides these cases which involved the right of "lateral" support of buildings, there is also one relating to "vertical" support in a case where the subjacent strata had been severed from the surface. The right of support of the surface soil in such a case is analogous to the right of "lateral" support, indeed so much so that in the case of *Humphries v. Brogden* (9), in which the right of the owner of the surface to have it supported by the subjacent severed minerals was first directly asserted, that right was deduced from the previous authorities cited above as to the right of "lateral" support, and in the case of support of surface by the minerals below there is now no question but that the right is a natural one.

In *Rogers v. Taylor* (10), the case to which I refer, the plaintiff's house had been built in 1824 upon land the quarries underlying which had been expressly excepted from the conveyance to him, and had become therefore a separate tenement, and the stone under the house

(1) 2 Roll. Abr., 564, Trespass I, pl. 1.

(2) 1 Lev., 122; 1 Sid., 167; 1 Keb., 625.

(3) 1 Selw. N. P., 11th ed. 457.

(4) 2 C. & K., 250.

(5) 9 Ex., 707.

(6) 8 E. & B., 140, 146, 157.

(7) E. B. & E., 636.

(8) 9 H. L. C., 611.

(9) 12 Q. B., 739.

(10) H. & N., 823.

had been got by the owner of the excepted quarries in 1840, leaving supports of the house at that time sufficient. In 1853 the defendant, the owner of the quarries and also of adjacent land, in quarry-755] ing *cut away the supports under the plaintiff's house and it fell. At the trial before the late Lord Chief Justice Cockburn it was contended on behalf of the defendant that in order to make out a title to have the house supported by the subjacent soil, the plaintiff was bound to show a continuous enjoyment for the required period "as of right," and that there had in fact been none such, but only a contentious enjoyment. But the direction of the Lord Chief Justice was that at the end of twenty years, after having built the house the plaintiff acquired the right of support unless something had been "done" to deprive him of it, and the question he left to the jury was whether the plaintiff had enjoyed the support for the foundation of his house for twenty years. The jury found that he had done so, adding the words "without interruption," and the ruling and verdict were upheld. I cite this case for the purpose of the precise language of the Lord Chief Justice in his ruling and direction. At the same time there is no doubt but that the Court of Exchequer, in supporting the direction and verdict, were inclined to place the right of vertical support of a house in the category of easements, requiring prescription or presumed grant for its foundation, and they adopted the same view as to "lateral" support in *Partridge v. Scott* (1), whilst in *Solomon v. Vinters' Company* (2), a case of support of building by building, they went further and expressed doubts as to the authority of *Stansell v. Jollard* (3), *Hide v. Thornborough* (4), and the observations of Lord Campbell in reference to this subject in *Humphries v. Bragden* (5).

In order to appreciate the correctness or otherwise of this view it is, I think, desirable to refer a little more in detail to the case of *Partridge v. Scott* (1), for the reasoning of the judges in that case shows that they were ready to affirm the existence of the right after the lapse of the requisite period of enjoyment, although they entertained a different view from that expressed in the decisions I have referred to as to its origin and mode of acquisition. The material facts in *Partridge v. Scott* (1) were, that there were two houses in respect of injury to which the action had been brought. One had existed more than thirty years, and was admittedly "ancient;" the other was admittedly "new;" and both were at the time of action brought found to be on excavated ground, so that at some time or other the surface had been deprived in part of what otherwise would have been its natural support. There was no evidence to show when this had happened, but it is obvious that in this state of things the owner of the houses had ever since that time been *de facto* enjoying a greater degree of support by, and was throwing upon, the neighboring soil, a greater burden than if his underlying soil had been in

(1) 3 M. & W., 220.

(2) 1 Selw. N. P., 11th ed., 457.

(3) 4 H. & N., 598.

(4) 2 C. & K., 250.

(5) 12 Q. B., 739.

its natural position. The fact of the excavation was also unknown to both parties, and, as beyond all question the acquisition of the right depends upon the non-interruption of the enjoyment by the neighbor only where he has the knowledge or means of knowledge that it is being had, and all he knew in that case was the inference which he was bound to draw from the known fact of the house being built and of necessity deriving support from his soil, the Court of Exchequer held that no right of support had been gained of either house, of one because it was "new," and the other because the underlying strata *might have been removed within twenty years. The [756 inference to be drawn from this case seems to me to be that but for that fact the right would have been acquired. It was pointed out by Littledale, J., in *Moore v. Rawson* (1) (a case of light), and by Fry, J., in *Hall v. Lichfield Brewing Company* (2), that such a right is not properly the subject of "grant," but that the implication of law to be made in support of it is a covenant not to interfere with the enjoyment; which seems to me to be merely an alternative mode of stating the right to depend (as put by Wightman, J.), upon the maxim of "*Sic utere tuo ut alienum non lædas.*" It is, I know, thought by some, for whose opinions I have the highest respect, that, thinking, as they do, that the right rests upon a presumed grant, it can only exist where all the circumstances are such as would have existed if there had been in fact such a grant made, and that it is unjust and inequitable to hold that such a right can be gained in cases like this where the servient owner has, as is admittedly the case, no power of preventing the enjoyment which is to found it. It is, however, clear that where the surface and subjacent strata have been divided horizontally into separate tenements, a house built by the owner of the surface, and which has, *de facto*, enjoyed the support of the subjacent minerals for more than twenty years has acquired the right of support of that mineral, unless, as in *Rowbotham v. Wilson* (3), there is evidence to the contrary; and in *Partridge v. Scott* (4) the right would have been extended by the Court of Exchequer to lateral support if the enjoyment there known had existed for twenty years. But what power has the servient owner in those cases to "prohibit" otherwise than by actual interruption of the *de facto* enjoyment; he cannot prevent the building; he cannot bring any action in respect of it? He can do nothing but interrupt the enjoyment. In the analogous case of light there is the same limitation of the power of prohibition, and yet the right admittedly exists; and in the cases as to water, to which I shall hereafter advert, in which the absence of the power of prohibiting was referred to, some of the judges who decided them, including, I think, one of your Lordships, declared that the decision in those cases was without prejudice to the determination of the question now raised for decision by your Lordships' House. Moreover, the foundation of a right upon mere long uninterrupted possession, as a

(1) 3 B. & C., 339.

(2) 49 L. J. (Ch.), 656.

(3) 8 H. L. C., 348.

(4) 3 M. & W., 220.

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matter of public convenience, is of very general application. Statutes of Limitation have no other origin, and it is upon this principle that Story, J., in his well-known judgment in *Tyler v. Wilkinson* (1), puts rights of this kind, for he says, "twenty years uninterrupted enjoyment is held upon principles of public convenience a conclusive presumption of a 'grant,' or 'right'" (expressly asserting the alternative). "The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law."

But whatever may be the correct view as to the origin of the right, all the authorities seem to agree that after twenty years' enjoyment the right is acquired; in the one case the view being that it arises from a presumption of origin by grant to be made in each [757] particular case from long uninterrupted possession, in *the other case that it has become an universal settled rule of law that the open enjoyment uncontradicted and unexplained is sufficient by itself, and there is in modern times, at least, no necessity for presuming in each particular case a thing which everybody knows is a mere fiction. That in any view the enjoyment must not be "*clam*" is clear; for to hold that a man is bound by a right of the growing acquisition of which he had neither knowledge, nor the means of knowledge, would be unjust and inequitable. Upon this absence of the means of knowledge of the enjoyment, the cases of *Partridge v. Scott* (2) and *Solomon v. Vinters' Company* (3) may well stand, and indeed the judgment of Bramwell, B., in the latter case is expressly based upon it.

My Lords, I now proceed to consider whether the authorities upon which I rely are fortified, or otherwise, by the authorities which relate to the rights as to light and air, between which and the right now under discussion a close analogy, in my judgment, exists. They both have their *de facto* origin in the same lawful use of land for habitation, and the necessity of light and air for its enjoyment. That such analogy has been *thought* to exist is clear. In the earlier books the right of light is asserted in conjunction with, and as mutually illustrating, or illustrated by, the right of support. In *Palmer v. Fleeshees* (4) the assertion of the then apparently well understood right of support of an "ancient" building was made, as tending to show the existence of the right to the enjoyment of an "ancient" window. In *Stansell v. Jollard* (5) Lord Ellenborough *e converso* fortified his ruling, that a *de facto* enjoyment for above twenty years of support gave the right to it, by referring to light as analogous; and so also the Court of Queen's Bench, in the case of *Humphries v. Brogden* (6), and Cresswell, J., in his observations during the argument in *Rowbotham v. Wilson* (7) resort to the same analogy. If, then, that analogy exists, it will, I think, be

(1) 4 Mason, U. S. R., 402, cited in
Gale on Easements, 219.

(2) 3 M. & W., 220.

(3) 4 H. & N., 585.

(4) 1 Lev., 122; Sid., 467; Keb., 625.

(5) 1 Selw. N. P., 11th ed., 457.

(6) 12 Q. B., 789.

(7) 8 H. L. C., 348.

found on reference to the authorities on the subject of light, that they affirm the conclusion arrived from the consideration of those relating to support. In *Moore v. Rawson* (1) the question to be decided was whether the dominant owner had lost a right to "ancient" windows which at a former time he unquestionably had possessed, and it was held that he had lost it by a mere abandonment of the enjoyment; and that result was arrived at by the application to the question of extinguishment of the principle upon which the right had originally been acquired. In his judgment in that case, Bayley, J., says (2), "The right to light, air, or water, is acquired by enjoyment," adding later on, "I think that according to the doctrine of modern times we must consider the enjoyment as giving the right." Littledale, J., says, "According to the present rule of law a man may acquire a right of way or a right of common. . . . But there is a material difference between the mode of acquiring such rights and a right to light and air. The latter is acquired by mere occupancy, the former can only be acquired by user accompanied with the consent of the owner of the land. . . . But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come *to him, and he [758] may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light he does not require any consent from the owner of the adjoining land; he therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building the owner of the adjoining land may afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbor. But if the light be suffered to pass without interruption during that period to the building so erected the law implies from the non-obstruction of the light for that length of time that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction." That this right arises from the mere uninterrupted enjoyment is, I think, further shown by two cases decided by Wilmot, C.J., in 1761 and 1768. In the first case, *Lewis v. Price* (3), the Chief Justice said (I do not know whether it was at Nisi Prius or not): "Where a house has been built forty years and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." And in the second case, *Dougal v. Wilson* (4), where the defendant proposed to show the non-existence of the windows at a period within the time of legal memory, the Chief Justice said: "If a man has been in possession of a house with lights for sixty years no man can stop them

(1) 3 B. & C., 339.

(2) 2 Wms. Saund., 175 a.

(3) 3 B. & C., at p. 386.

(4) Ibid.

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up." In another case, the *Wells Harbor* (1), Buller, J., cited the language of the presiding judge thus, "I think twenty years uninterrupted possession of windows is a sufficient right for the plaintiff's enjoyment of them." It has indeed been supposed that the decisions of Wilmut, C.J., were disapproved of in the subsequent case of *Darwin v. Upton* (2), but I cannot share in that view. That case was tried at Nisi Prius before Gould, J. It appeared that the lights had been in existence for twenty-five years, and the defendants offered to prove that they had had no earlier existence. Gould, J., thought that the possession of twenty-five years, if unanswered, was sufficient, but if the defendant could offer anything to explain the possession and show that it was in any way limited or modified or was bad in its commencement he might do so. No evidence of that kind having been offered a verdict was given for the plaintiff, with leave reserved to move. On the motion a rule was granted upon the counsel's allegation that Gould, J., had told the jury that the possession was an "absolute" bar, instead of leaving the question to them as a presumptive bar, and upon that supposition the rule was in the first instance made absolute, but was afterwards discharged on the report of the judge that this was an error. On the argument of the rule Lord Mansfield said that enjoyment of light with the defendant's acquiescence was such a decisive presumption of right by grant "or otherwise" (specifically mentioning as Lord Ellenborough, Parke, B., and Story, J., did, the alternative origin) that unless contradicted or explained a jury ought to believe it. And this view was affirmed by the Court of Queen's **759**] Bench in the subsequent case of **Cross v. Lewis* (3). In that case the lights had been in existence for thirty-eight years, during twenty of which the adjoining premises had been in the possession of Percy as tenant, and there was no evidence that the reversioner or his family, had ever been near the place. At the trial Holroyd, J., held the lights to be "ancient," and directed the jury to find a verdict for the plaintiff. A rule was then moved for on the ground of misdirection in not leaving it to the jury to say whether they believed that notice of the enjoyment had or had not been given to the servient owner, which is the question raised by the defendants in the case now before your Lordships. The court, however, upheld the ruling of Holroyd, J., Bayley, J., saying that it had been always held since *Darwin v. Upton* (4), that in the absence of any evidence to rebut, after possession of twenty years a presumption of right arose "and that a jury should be directed to act upon it." He adds that if the neighbor objects to the windows he may put up an obstruction, but that is his only remedy; if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them. Holroyd, J., says they are "ancient lights," and the plaintiff had a right by law to enjoy them. He adds, it is not

(1) 2 Wms. Saund., 175 c.

(3) 2 B. & C., 686.

(2) Ibid.

(4) 2 Wms. Saund., 175 c.

a question to be determined by the jury unless there is evidence to contradict their being "ancient lights." At first they may be obstructed, but if no interruption is offered, the owner of them may prescribe for them as "ancient windows."

The result which I deduce from these authorities is that the *de facto* enjoyment is the origin of the right, and if that be not contradicted or explained the jury may and should be directed to act upon it.

The cases relating to water, to which I have referred as of the third class, were greatly relied upon on the argument before your Lordships as showing that no right at all could exist in the case of support, one of the reasons given for not implying any grant in those cases being that there could be no resistance on the part of the servient owner. They were cases of percolating water (*Chesmore v. Richards* (1)), which had not yet been confined and accustomed to run in a definite channel, or of air unconfined not having been taken into and enjoyed in a tenement through a definite aperture (*Webb v. Bird* (2)), and smoke (*Bryant v. Lefever* (3)). These cases seem, however, to me to be so essentially different from the case before your Lordships that it is unnecessary to consider them in detail. The principle which underlies them all I conceive to be that, until defined and confined, there is in those cases, as in light and air in its natural state, no subject-matter capable of being the subject of a lawful grant, nor from the very nature of them can there be any definite occupation or enjoyment.

There remains only to be considered the last class of cases, viz., those relating to rights of way and common and easements of that description. But the distinction between such easements and the right to air and light was pointed out, as I have already said, by Littledale, J., in *Cross v. Lewis* (4) and again in *Moore v. Rawson* (5), which latter judgment was referred to with approval by the Court of Exchequer Chamber in *Webb v. Bird* (6). Such rights are unlawful in their origin. The first of the acts is a trespass; [760] whereas, in the case of light and support, the acts are in themselves lawful acts, done in the lawful occupation and user of a man's own land, and I do not think it useful to trouble your Lordships with any observations upon them.

I answer your Lordships' second question in the affirmative. As has been repeatedly stated, the enjoyment, which was originally necessary to found the presumption of right, must have had its commencement before the time of legal memory; but upon principles of public convenience, this period of antiquity has been clearly departed from, and the necessary limit has by successive stages been reduced to an enjoyment of twenty years, which is clearly sufficient to make a building or window "ancient."

I answer your Lordships' third question in the negative. If it be,

(1) 7 H. L. C., 349.

(2) 10 C. B. (N.S.), 268; 13 Ibid., 841.

(3) 4 C. P. D., 172.

(4) 2 B. & C., 686.

(5) 3 B. & C., 339.

(6) 18 C. B. (N.S.), 841.

as I think, absolutely settled law that the right depends upon the "*de facto*" enjoyment known to both parties, and acquiesced in by the servient owner, the measure of that right will not be such enjoyment as he may be able to prove to the satisfaction of a jury that the servient owner of the inheritance had actual notice of, but at least the actual enjoyment known and acquiesced in by the servient owner during the requisite period of enjoyment, or perhaps such enjoyment by the owner of the dominant building as the owner of it may be entitled to have for any purpose to which he may already have or may thereafter lawfully put it. The case of *Partridge v. Scott* (1) shows that, in order to confer the right, the enjoyment must be of such a nature as to indicate to the servient owner that the acquisition of a right of support is in progress, the Court of Exchequer holding that the right was not gained in that case because, although the existence of the house was patent, it was not known that it had only excavated soil for its vertical support.

In the case of light also a similar measure of enjoyment prevails. The rule in that case is, that the extent of light acquired is proportionate to the actual amount of enjoyment had: *Martin v. Goble* (2); *Lanfranchi v. Mackenzie* (3). There are, however, several authorities enlarging this right, and tending to show that the dominant tenement has a right, not merely to the light actually enjoyed for the twenty years during which it had been accruing, but to all the light and air which will come through the window, and which may be necessary for any ordinary and lawful purposes for which the building has been, or at any future time may be, used, and this view has recently been adopted by the Queen's Bench Division in the case of *Moore v. Hall* (4). Whether this view is consistent with the principles upon which the acquisition of the right of light and air depends, and the earlier authorities, it is not necessary now to consider, for the limitation of the right to that degree of enjoyment which has been had during the twenty years is sufficient for the determination of the present case. In the present case it is admitted that the actual enjoyment of the plaintiff's building in its altered state has existed for more than that period, and the only question, therefore, that it is necessary to determine is whether that enjoyment was or might have been known by the defendant's predecessors in title so as to indicate to them that the right was being acquired. In the case of light all that the servient owner knows or has the means of knowing is the area of the aperture through which the light *passes. He has no notice of the size of the rooms, or of their distribution, or the objects for which the light is required. It may be that the light is used for a hall or a kitchen requiring the most ordinary degree of light, but it may be (as in *Lanfranchi v. Mackenzie* (3)) used for a room for exam-

(1) 3 M. & W., 220.

(2) 1 Camp., 320.

(3) Law Rep., 4 Eq., 421.

(4) 3 Q. B. D., 178; 28 Eng. R., 164.

ining samples, purposes requiring a special degree or quality of light, and yet if the servient owner obstruct the light necessary for such user, although it is more than, or different in quality from, that which is required for the ordinary purposes of a house, he will be liable to an action; in other words he is violating a right acquired by his neighbor's actual enjoyment.

It has been said that in this case the defendant and his predecessors in title did not see, and could not know, the quantity of support required by the plaintiff's house after the alterations. But the enjoyment, in fact, of the support was known, or might be known, to everybody, and I think that under such circumstances the servient owner must be held, upon presumption of public convenience, to know that the support which is being enjoyed is that of the weight of such a building constructed and used for any ordinary purpose of pleasure or business for which it is calculated. Whether the alterations in the plaintiff's premises had the effect of throwing more weight upon the defendant's soil than the original structure did, is a matter, no doubt, which might be open to contest, and if those alterations had been made at any time within the last twenty years a different question might have arisen from that now before your Lordships. But, assuming that the messuage had been built in the mode to which it is now altered, could it have been said that it had not become "ancient," and, as it has stood in that state for twenty-seven years, why is it not in its altered state "ancient?" These alterations were openly made, and the premises have been as openly enjoyed as (or probably from the particular nature of the business more openly enjoyed than) other buildings with a capacity for enjoyment for like purposes.

In the case of any house which openly enjoys the support of neighboring land, does the neighbor ever know, even approximately, what extra weight his land has to bear beyond the weight of the soil which it is bound as of right to bear? By what process would a neighbor, in any ordinary case, know how far he might safely dig so as not to let down the soil of the adjoining owner, and yet dig just as far as he wished without bringing down the building? If every owner of a building were required, in cases where the enjoyment has been had for long periods (and be it recollected there is no other dividing line after you have passed twenty years until Richard I. is reached), to prove the existence of all the circumstances which would go to make up a grant binding upon the owner of the neighboring inheritance, in how many cases could he support the burden, and what would be the number of now existing houses in England the owners of which would not find themselves liable to have their enjoyment of support put an end to? To leave the questions which would be involved in such cases to juries instead of letting the solution of them depend upon a clear and absolute settled rule of law would in my judgment introduce great uncertainty in title and much real injustice. In truth the burden imposed upon the servient owner is not a very heavy one. Before it could exist he had twenty

years in which to make any lawful use of his own property. He [769] has the *correlative right of support of his own property, and all that he has to do if he wants to alter the state of the property is to leave sufficient soil to support the wall. Or if he wishes to remove all the soil, he has but to provide temporary strutting and supports, whilst the well-understood process of underpinning is being carried on. When the extensive substitution of enormous for smaller buildings which has within the last thirty years under the law as now understood been going on is considered, and that so little litigation has ensued upon it, it does not appear to me that there can be any great injustice or hardship in leaving the rule as it is.

In answer to your Lordships' fifth question, I think that the direction of the learned judge was right. The plaintiff had given affirmative evidence of the actual enjoyment by his building in its altered condition for twenty-seven years, and it was in no way proposed to offer any denial, explanation, or modification of this actual enjoyment. It is unnecessary, therefore, to consider the question what rebutting evidence (if any) might or might not in cases similar to the present be given; it is enough to say that no such was suggested here. The learned judge offered to admit proof that the wall would not have fallen if it had not been for the weight imposed upon it, but that offer was declined, and, for the reasons I have stated, the right does, in my judgment, not depend upon whether the owner of the tenements has or has not had actual notice of the degree of support required, or of the precise circumstances upon which that depends. In the present case, as in *Darwin v. Upton* (1) and *Cross v. Lewis* (2), I think the jury were bound to act upon the "decisive" presumption thus afforded of the existence of the right, and that the learned judge was right in so holding. I am unable to see what necessity there was for or what advantage could have been gained by his leaving any question to them. They would either have done their duty and given their verdict in accordance with the presumption as directed, or they would have found a verdict in defiance of this direction. In the former case the result now arrived at would have directly followed the verdict. In the latter case, the court, if they considered the direction right as I do, and the verdict wrong, would under Order 40, Rule 10 of the rules under the Judicature Act, having all the materials before it, have declined to act upon the verdict and have entered judgment for the plaintiff.

LINDLEY, J.:—My Lords, the first question put to us by your Lordships must, in my opinion, be answered in the affirmative. The current of authority on this point from *Palmer v. Fleshees* (3) down to the present time is unbroken. No trace of any doubt about it can be found: and no judge by whom this particular case has hitherto been considered has questioned it.

The second question cannot be so easily answered. It appears to me to depend on the view a jury might take of the facts of this par-

(1) 2 Wms. Saund., 175 c.

(2) 2 B. & C., 686.

(3) 1 Sid., 167.

ticular case, and, in particular, of the peculiar construction of the plaintiff's house.

The following legal propositions bearing on this question appear to be settled beyond controversy:

(*First.*) The owner of an ancient building (*i.e.* of a building so old that the *non-existence of it cannot be proved) has a [763 right of action against the owner of land adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land.

(*Secondly.*) The owner of a building which has in fact been supported by his neighbor's land for twenty years has, *prima facie* at all events, a right of action against the owner of the adjoining land if he disturb that land so as to take away the support afforded by it. This proposition is I conceive only open to doubt on the ground that it is not wide enough; but to the limited extent here stated all the authorities seem in accord, and no judge has questioned it. The authorities to which I refer are *Stansell v. Jollard* (1); *Wyatt v. Harrison* (2); *Partridge v. Scott* (3); *Hide v. Thornborough* (4); *Humphries v. Brogden* (5); *Gayford v. Nicholls* (6); *Rowbotham v. Wilson* (7); *Rogers v. Taylor* (8); *Solomon v. Vintners' Company* (9); *Hunt v. Peake* (10); *Bonomi v. Backhouse* (11). These cases will all be found examined and discussed by the Queen's Bench Division and the Court of Appeal, and I forbear, therefore, to trouble your Lordships with more than their names.

(*Thirdly.*) The owner of a newly-erected building has no such right of support unless his neighbor has conferred it upon him. This proposition is, in my opinion, as clearly settled as the other two. The authorities in support of it are *Wilde v. Minsterley* (12); *Wyatt v. Harrison* (2); *Partridge v. Scott* (3); *Humphries v. Brogden* (5); *Gayford v. Nicholls* (6); all of which are commented on in the judgment of Brett, L.J.

From the first and second of the above propositions it follows, that a right to lateral support in respect of buildings may be acquired by English law, and may be acquired in modern times; whilst from the third proposition it follows that the right is not a mere incident to the ownership of land. *Bonomi v. Backhouse* (13) is said to be opposed to this view, but I cannot so regard it; for in that case the plaintiff's house was an ancient house, his land was let down, and nothing turned on the pressure exerted by the house itself. The plaintiff clearly had and was assumed to have a right of action; and the only question raised and decided was when his right of action accrued. Combining the same propositions and having regard to

(1) 1 Selw. N. P., 11th ed., 457.

(2) 3 B. & Ad., 871.

(3) 3 M. & W., 220.

(4) 2 C. & K., 250.

(5) 12 Q. B., 739.

(6) 9 Ex., 702.

(7) 6 E. & B., 598; 8 E. & B., 123; 8

H. L. C., 348.

(8) 2 H. & N., 828.

(9) 4 H. & N., 535.

(10) Joh., 705.

(11) E. B. & E., 622, 646; 9 H. L. C., 503.

(12) 2 Roll. Abr., 564, tit. Trespass I,

pl. 1.

(13) E. B. & E., 622; 9 H. L. C., 503.

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the language of the decisions which support them, it further follows that lapse of time is essential to the acquisition of a right to have a building supported by the land of another person, and that such right is by English law an easement, or a right in the nature of an easement. A little reflection, however, will suffice to show that the easement of lateral support is of a peculiar kind; it is not a purely negative easement like the right to light; for support, even when lateral, involves pressure on and an actual use of the laterally supported soil. Further, the actual enjoyment of lateral support is incapable of interruption by physical means, except by the removal of the soil which affords the support; or, in other words, by the destruction more or less of the servient tenement. Notwithstanding the first peculiarity, no trace is to be found in our law books of any action at law or suit in equity based upon any wrong done to the owner of the servient tenement; and the general opinion certainly is that in the absence of actual damage to the soil, no such action or suit could be maintained. Upon principle, I confess I do not see why this should be so. If a person builds so near the edge of his own land as to use his neighbor's land to support his house without his neighbor's consent, I do not see why such neighbor should have no cause of action. The enjoyment of light coming across adjoining land and the enjoyment of the use of such land for support are in some respects entirely different; for no use is made of a man's property by opening a window on other property near it; and a right not to be overlooked is not recognized by our law. At the same time in every case in which the right to lateral support is alluded to, it is treated as analogous to the right to light, and the difference to which I have drawn attention has not been dwelt upon or treated as material. Nevertheless, whatever my own opinion would be, looking at the matter theoretically, I am not prepared to say that an action for damages or an injunction could be maintained in such a case as I have supposed. The authority against it, although purely negative, would, in my judgment, be considered as too strong to be got over. If, however, your Lordships should be of a different opinion, I apprehend that it would follow that the Prescription Act (2 & 3 Will. 4, c. 71, s. 2) would apply to and include an easement of lateral support; and the law upon this important subject would then be contained in the provisions of that statute. But all the judges before whom this case has come, concur in holding the Prescription Act not to apply; and, in the absence of authority to the contrary, I am not prepared to differ from them.

As regards the practical possibility of physically obstructing the use of one's land by another for the support of his own house it is to be observed:

1. That in a literal, *i.e.*, merely mechanical sense, such obstruction is always possible;
2. That it is possible only by a removal of the soil used for support;

3. That such removal may or may not be convenient to its owner; he may or may not require to remove it for purposes of his own;

4. That, if he does not require to remove it for his own purposes, a law which renders it necessary for him to remove it in order to preserve his unrestricted right to do so at some future time, does not commend itself to common sense; for if his land is itself already built upon, such a law would impose upon him the necessity of removing part of his own property, and to destroy, or to incur great expense in order to avoid destroying, more in order to preserve his rights intact. In these respects the power of preventing the acquisition of a right to light, and the power of preventing the acquisition of a right to lateral support are very different; but notwithstanding these differences every authority on the subject treats the right to such support as capable of being acquired in the same way as the right to light. *Stansell v. Jollard* (1); *Hide v. Thornborough* (2); *Gayford v. Nicholls* (3); *Partridge v. Scott* (4); *Rowbotham v. Wilson* (5); *Rogers v. Taylor* (6); and *Humphries v. Brogden* (7) all support this view, and are inconsistent with any other. In the face of this current of authority I am unable to come to the conclusion that the physical difficulty of obstruction brings the right to lateral support within the cases of *Webb v. Bird* (8); *Chasemore v. Richards* (9); and *Sturges v. Bridgman* (10); for if those cases applied, the right to lateral support could not be acquired at all by mere enjoyment however long continued; and in my opinion the authorities to which I have referred clearly establish that it can be so acquired under circumstances to which I propose now to allude.

The authorities already referred to appear to me to establish that a right to lateral support, although not within the Prescription Act, and although in many respects unlike a right to light, can be acquired in the same way and under the same circumstances as a right to light could be acquired before that act passed. A careful study of those authorities has driven me to this conclusion, from which I see no escape. Without going over the cases so exhaustively examined and discussed in the courts below it will be sufficient, after the observations already made, to say that the view taken by Cotton and Thesiger, L.JJ., on the mode of acquiring a right to light independently of the Prescription Act appears to me to be more correct than the views taken by Lush, J., on the one side, and by Cockburn, L.C.J., and Mellor, J., and Brett, L.J., on the other. The absence in fact of a grant, meaning thereby a deed under seal, cannot in my opinion be conclusive against the plaintiff. An agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and for the purpose of creating a

(1) 1 Selw. N. P., 11th ed., 457.

(2) 2 C. & K., 250.

(3) 9 Ex., 702.

(4) 3 M. & W., 220.

(5) 6 E. & B., 598; 8 E. & B., 123; 8 H. L. C., 348.

(6) 2 H. & N., 828.

(7) 12 Q. B., 739.

(8) 13 C. B. (N.S.), 841.

(9) 7 H. L. C., 349.

(10) 11 Ch. D., 852.

lawful user is as good as a deed. Again, assent or acquiescence on the part of the defendants to the erection of the plaintiff's building with a knowledge of its peculiar mode of construction would, in the absence of any deed under seal, entitle the plaintiff to maintain this action: see *Brown v. Windsor* (1).

The theory of an implied grant was invented as a means to an end. It afforded a technical common law reason for not disturbing a long continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested the presumption in favor of its legality ought to be made. Nor am I aware of any instance in the equity reports in which it has been held that an easement openly and uninterruptedly enjoyed for twenty years has been destroyed simply by proof that no grant under seal was ever in fact made. The theory of an implied grant, as distinguished from a legal presumption of some lawful origin, is, in my opinion, untenable and practically misleading, especially now that principles of equity as well as of law have to be applied both to trials with juries and to trials without. I feel a difficulty in saying that acquiescence on the part of the defendant is essential to 766] the acquisition by the plaintiff of a right to *support. No one can be properly said to acquiesce in what he cannot prevent; and it rarely happens that the use of land for lateral support can be practically prevented. Express dissent, i.e., an express protest, would no doubt negative assent; and if acquiescence by the owner of the servient tenement is essential to the acquisition of a right to lateral support, a protest by him ought to be sufficient to prevent its acquisition. But I can find no trace of any authority to the effect that a protest would suffice for that purpose in this case any more than in other cases more or less similar, and I understand *Cross v. Lewis* (2) to be an authority against the sufficiency of a protest in a case of light. Further, it is difficult to see why a protest should be required to preserve a right which is not being infringed. A protest is evidence of dissent, but nothing more, and until it is shown that assent is important, dissent cannot be of any avail. The only way in which I can reconcile the authorities on this subject is to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved the right will be acquired as against an owner in fee of the servient tenement, unless he can show that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right. In the absence of an uninterrupted open enjoyment the right cannot be acquired, and the answer to your Lordships' second question appears to me to turn on whether the enjoyment in this particular case was open; and

(1) 1 Cr. & J., 20.

(2) 2 B. & C., 686.

this again appears to me to be a question of fact which ought to have been left to the jury. The learned judge who tried the case considered that as the plaintiff's building was openly built and enjoyed, it followed that he had openly enjoyed the support which he in fact had had. I do not think that this is a necessary inference; for the building was very peculiarly constructed, and I agree with Cotton and Thesiger, L.JJ., that the jury should have had their attention called to this point, and have been asked whether the plaintiff had in fact openly enjoyed the support the right to which he claimed. My answers to the third, fourth, and fifth questions will show more fully what I mean here to convey. Open enjoyment of the lateral support, a right to which is claimed, is in my opinion a condition of the acquisition of the right, because by English law a right to lateral support for a building is treated as an easement; and easements cannot be acquired unless their enjoyment has been open. The necessity for open enjoyment in cases of lateral support is stated in or to be inferred from the language of the decisions in *Hide v. Thornborough* (1), *Gayford v. Nicholls* (2), *Partidge v. Scott* (3), and *Humphries v. Brogden* (4). Moreover, the reason for requiring open enjoyment exists, although it is not cogent or obvious in the case of lateral support as it is in the case of other easements, the acquisition of which can be more easily prevented.

In answer to your Lordships' third and fourth questions, for the reasons already given, I am of opinion that it is incumbent on the plaintiff to prove an open enjoyment of the right he claimed. But if he proves such open enjoyment it is not in my opinion necessary for him to adduce further evidence to prove that the *defendants or their predecessors in title had knowledge or notice of the alterations made in 1849, or of the effect of such alterations in order to make the damages done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong. What is proof of open enjoyment will appear from my answer to the next question.

In answer to your Lordships' fifth question, for the reasons already stated, I am of opinion that the course taken by the learned judge at the trial in directing a verdict for the plaintiff was not correct. He ought to have left the jury to decide the question of open enjoyment by the plaintiff of the right he claimed. In order to make this question intelligible to jurymen they should be told that they ought to consider that the plaintiff had openly enjoyed all that support which any reasonably competent person, seeing the ground and the plaintiff's building (but knowing nothing of its peculiarities), would infer it required when used for the purposes for which it was apparently constructed and adapted; but any support which in fact the building might require beyond this ought not to be considered as openly enjoyed, unless the necessity for such additional support

(1) 2 C. & K., 250.

(3) 8 M. & W., 220.

(2) 9 Ex., 702.

(4) 12 Q. B., 739.

was in fact known to the defendants or their predecessors in title. In the great majority of cases the existence and nature of the building will render it unnecessary to investigate such a question as this; for it is only in cases of an unusual character that a building requires more support than any competent person seeing it would suppose. But in my opinion the plaintiff's building in this case was so peculiarly constructed as to render it quite possible for the defendants to prove, first, that the plaintiff had enjoyed more support than any one would infer from the nature and character of his building, and, secondly, that the building fell by reason of the withdrawal of such extra support, which, although enjoyed in fact, had not been enjoyed openly or to the knowledge of the defendants or their predecessors in title. If the defendants had succeeded in proving these points they would in my judgment have been entitled to a verdict; and it is because they had no opportunity of giving such proof that I think there ought to be a new trial. A direction to the jury to the effect above-mentioned would not only be in accordance with law as I understand it, but would also, I think, be free from practical difficulties or objections; for it comes to this, that, speaking generally and excluding cases of settled estates and other anomalous cases, the owner of a house which has existed for twenty years is entitled to such support as any one acquainted with building can see the house requires, but not to more unless he can show actual notice of enjoyment of more.

LOPES, J.:—My answers to the questions put to me by your Lordships are the same as those contained in the opinion of my brother Lindley, and I give them after having carefully perused and considered the opinion he has read to your Lordships, and for the reasons stated in it.

MANISTY, J.:—My Lords, I concur in the opinions expressed by my learned brothers Pollock and Field in answer to all the questions submitted by your Lordships to the judges. Nevertheless I think it right to make some supplementary observations of my own with reference to the first, second, and fifth questions, each of which ought in my opinion to be answered in the affirmative. I found that opinion upon the following propositions:

(1.) That the right to lateral support for buildings from adjacent
768] soil is not *the right to an easement in or over that soil, but is a right of property, namely, the right of the owner of the buildings to enjoy his property free from interruption by his neighbor, even though that interruption be caused by acts done by his neighbor in his own land which are in themselves lawful.

(2.) That this is not a natural right but a right of property, which when acquired is of the same character as a natural right.

(3.) That a house, or building which has stood for upwards of twenty years is in the eye of the law an "ancient" house or building.

(4.) That the law presumes, *until the contrary is proved*, that the owner of an ancient house, or building, who has enjoyed it free from

interruption by a neighboring proprietor for upwards of twenty years, has acquired the right so to enjoy it for the future.

(5.) That the contrary may be proved as I shall afterwards show ; but the presumption of law cannot be rebutted by merely proving that no grant of support was in fact ever made by the neighboring proprietor.

In support of these propositions I shall consider in the first place what is the true character of the right in question, because it seems to me that this goes to the root of the case. And in this I am fortified by what Brett, L.J., said in giving judgment in the Court of Appeal in the case now under consideration. He is reported to have said (1) : "The first question to be determined is whether the right claimed is a right of property, for if it is, it is unnecessary to inquire further in this case, the plaintiff being clearly entitled to succeed." His Lordship having expressed that opinion proceeded to consider whether the right claimed was a right of property or a right to an easement, and came to the conclusion that it was the right to an easement. From that conclusion I venture respectfully to differ. No doubt for many years the right of lateral support for buildings from adjoining soil was considered and treated as the right to an easement, and consequently in order to maintain the right the fiction of a lost grant was resorted to, and juries were directed that they ought to find *as a fact* that which they and every one else knew was *not* the fact. The right was sometimes called an "easement" *simpliciter*, sometimes a "negative easement," but in 1857, in the case of *Rowbotham v. Wilson*, in the Exchequer Chamber (2), Cresswell and Williams, J.J., and Martin and Watson, B.B., expressed a strong opinion that it was one of the ordinary rights of property and not an easement. Bramwell, B., said (3) : "After a house has stood for twenty years it acquires a right to support from adjoining land." The case of *Bonomi v. Backhouse* (4) was decided by the Court of Queen's Bench in the following year (1858). The right claimed in that case and the mode of acquiring it were in all material circumstances identical with those in the present case, and the four eminent and learned judges who heard it were unanimously of opinion that the right of lateral support for an ancient house from neighboring soil is not an easement acquired by grant but a proprietary right, which may be acquired by uninterrupted enjoyment for upwards of twenty years. Lord Campbell, in giving judgment, said : "I agree in the opinion that the right of support which the plaintiffs claim is a *natural right of property to be presumed till, as [769 in *Rowbotham v. Wilson* (5), evidence is given to rebut that presumption, and that such a right is not to be considered an easement or servitude arising from grant." Coleridge, J., said : "It seems to me that the interest which the plaintiffs allege in themselves and to have been injured by the defendant, is in the nature of a right grow-

(1) 4 Q. B. D., at p. 191.

(2) E. B. & E., 622.

(3) 8 E. & B., 123.

(4) 6 E. & B., 593; 8 E. & B., 123; 8

(5) 8 E. & B., at p. 140.

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ing out of ownership, or incident to the ownership of land, and not an easement on the land of another arising from grant or in any other way." Erle, J., said : " Upon the facts as stated by Wightman, J., I am of opinion that the right to support is one of the ordinary rights of property, and not an easement or right acquired by grant or otherwise." Wightman, J., said : " Upon consideration of all the cases it appears to me that the cause of action in such a case as the present is founded upon a breach of duty on the part of the defendant, by so using his own property as to injure that of his neighbor, and not upon any right of the plaintiffs to an easement in, upon or over the land of of their neighbors. Where *ancient* buildings are standing upon the plaintiffs' land, the defendant must take care not to use his own land in such a manner as to injure them." The learned judges, though unanimous as to the character of the right claimed and the mode of acquiring it, differed as to the effect of the Statute of Limitations, three of them being of opinion that the statute began to run from the time when the adjacent soil was removed ; the fourth (Wightman, J.), holding that it did not begin to run till the plaintiffs' house was injured, and accordingly judgment was given for the defendants.

The case was taken upon appeal to the Exchequer Chamber. It was argued before Willes and Byles, JJ., and Martin, Bramwell and Watson, BB., (1), the three Barons being three of the judges who expressed the opinion to which I have already adverted in *Rowbotham v. Wilson* (2). The court unanimously gave judgment for the plaintiffs, affirming the judgment of the Queen's Bench as to the plaintiffs' right to support, but reversing it on the ground that the Statute of Limitations was not a bar to the action, as it would have been if the right claimed had been that of an easement. In delivering the judgment of the Exchequer Chamber, Willes, J., said : " The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them ; but the character of the right when acquired is in each case the same." *Bonomi v. Backhouse* came before this House by way of appeal in 1869 (3). The judgment of the Exchequer Chamber was affirmed. In giving judgment Lord Wensleydale said : " I think it perfectly clear that the right claimed is not in the nature of an easement, but to the enjoyment by the plaintiff of his own property, the obligation being cast upon the owner of the neighboring property not to interrupt that enjoyment." But for opinions expressed to the contrary by very learned and eminent judges in the courts below, in the case now under consideration, I should have thought that the character of the right claimed and the mode of acquiring it were settled and conclusively established by the cases of *Rowbotham v. Wilson* (2), *Bonomi v. Backhouse* (4), and *Backhouse v. Bonomi* (3) ; and I cannot help thinking that the opinions

(1) E. B. & E., 646.

(2) 9 H. L. C., 503.

(3) 6 E. & B., 598 ; 8 E. & B., 123 ;

(4) E. B. & E., 622.

8 H. L. C., 348.

of the two very learned judges (the late Lord Chief Justice of England and Brett, L.J.), *who delivered judgments in favor of the [770] defendants in the present case, must have been founded upon a misconception of the facts which existed in the case of *Bonomi v. Backhouse* (1). I proceed to state my reasons for thinking so. In *Angus v. Dalton* (2), the late Lord Chief Justice Cockburn is reported to have said: "The cases of *Rowbotham v. Wilson* (3) and *Bonomi v. Backhouse* (1) are not at all in point. The right of support there claimed was not of lateral but of vertical support, and was not in the nature of an easement but of a proprietary right, the right of the owner of the surface land to have the support of the strata below as of absolute right independently of user or of right acquired by enjoyment. This distinction was expressly pointed out by Lord Wensleydale when the case of *Bonomi v. Backhouse* was before the House of Lords." Now in *Rowbotham v. Wilson* (3) the plaintiff claimed the right of both adjacent and subjacent support. The instrument under which he acquired the surface showed that he was not entitled to either; and judgment was given against him upon that ground, but the *dicta* of the judges are in point. In *Bonomi v. Backhouse* (1) the right claimed was, as I have already said, identical with that claimed in the present case. It was not a claim to vertical support as supposed by the late Lord Chief Justice, but a claim to lateral support. It was not a claim by the owner of the surface land to have the support of the strata below as of absolute right independently of user or of right acquired by enjoyment; but it was a claim to lateral support of a house and outbuilding from the soil of the neighboring proprietor acquired by user and enjoyment for forty years and upwards. In giving the judgment of the Exchequer Chamber in *Bonomi v. Backhouse*, Willes, J., summed up the whole case in these words (4): "The plaintiff was owner of the reversion of an ancient house. The defendants, more than six years before the commencement of the action, worked some coal mines 280 yards distant from it. No actual damage occurred until within the six years. Question, Is the Statute of Limitations an answer to the action?" and the court held unanimously that it was not. It was in view of, and with reference to, the facts as found by the arbitrator, and stated by Willes, J., and not of the facts as stated by the late Lord Chief Justice, that Lord Wensleydale made the observations which the late Lord Chief Justice, strangely as it seems to me, relies upon as showing that the case of *Bonomi v. Backhouse* (1) is not in point. Brett, L.J., in giving judgment in the present case, said (5): "The judgments in *Bonomi v. Backhouse* (1) are to be applied to excavations which would have let down the plaintiff's land though not built upon." His Lordship founds that assumption on the circumstance that there is no reference in the facts stated by the arbitrator, or in the arguments of counsel, to

(1) E. B. & E., 622.

(2) 3 Q. B. D., at p. 130.

(3) E. B. & E., at p. 654.

(4) 6 E. & B., 593; 8 E. & B., 123; 8 H. L. C., 348.

(5) 4 Q. B. D., 195.

any distinction between the support necessary for the land, if it had been unbuilt upon, and that necessary for the buildings. The reason why no such reference was made (and this I know for a fact, having been counsel for the plaintiffs from the commencement to the conclusion of the case) was that the findings of the arbitrator and the arguments of counsel were confined to the case made by the plaintiffs, namely, that they were entitled to have their ancient buildings supported. There is not a trace in the pleadings, 771] *or in the findings of the arbitrator, or in the arguments of counsel, of a claim to have the soil on which the house stood supported by the adjacent soil. Their case from first to last was that their buildings were ancient (that is to say, upwards of twenty years old), and that by reason of uninterrupted enjoyment during that period they had by law acquired the right to enjoy them free from interruption caused by acts done by their neighbors in the adjacent land. I am at a loss to understand why the judgments in *Bonomi v. Backhouse* (1) should be applied to a claim which was never made, and to facts which were not found, rather than to the claim which was made and the facts which were found.

It only remains for me to say a few words with reference to the fifth question submitted by your Lordships to the judges. Assuming the right claimed to be a right of property such as I have endeavored to show it is, and that in the absence of any evidence to the contrary the law presumes it to have been acquired by uninterrupted enjoyment for twenty years and upwards, the question arises how may the contrary be proved. To this I answer, by evidence explanatory of the user, showing affirmatively that the owner of the buildings holds his property subject to the right of the owner of the subjacent or adjacent soil to take away the support. Such was the evidence given in *Rowbotham v. Wilson* (2), *The Duke of Buccleuch v. Wakefield* (3), *Aspden v. Sedden* (4), and other cases which might be cited to the like effect. It may be that the presumption might be rebutted in some other way, such as by showing that the owner of the adjacent or subjacent soil was under disability during the time when the right of support was alleged to have been acquired. It is unnecessary to express any opinion on that point as no such question arose in the present case. If the presumption be one of law, it follows that neither positive acquiescence, nor a grant of support as a matter of fact, by the owner of the neighboring soil is requisite for the acquisition of the right in question. If the view I take of the case be correct, then the long recognized right of the owner of an ancient house to enjoy it free from interruption by his neighbor will be preserved, and it will henceforth be based upon fact and a sound principle of law, instead of, as heretofore, upon fiction and unseemly verdicts of juries.

Fry, J.:—My Lords, before specifically replying to the questions propounded by your Lordships, I think it desirable to express the

(1) E. B. & E., 622.

(2) 8 E. & B., 123; 8 H. L. C., 348.

(3) Law Rep., 4 H. L., 377.

(4) Law Rep., 10 Ch., 394.

views which I entertain upon the general subject of the right of the owner of a building to lateral support for that building by the land of an adjoining proprietor.

Such a right may be created by an actual instrument between the two owners. The right being, not to a thing to be done or used in the neighbor's soil, but to a limitation of the user of that soil by the neighbor himself, does not lie in grant, but would be created by a covenant by the neighbor not to use his own land in any manner inconsistent with the support of the adjoining buildings (see the judgment of Littledale, J., in *Moore v. Rawson* (1)), and such a covenant might either be express or might be inferred from the object and purport of the instrument, as in *Caledonian Railway Company v. Sprott* (2).

*Leaving the consideration of the right as constituted by [772 actual contract between the parties, questions of great difficulty arise; and, in respect of these, I have most unwillingly arrived at the conclusion that principle and authority are in direct opposition to one another.

On principle it appears to me that it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors. Such a principle would prevent the owner of a house from ever acquiring a right to lateral support except by actual contract. An opposite view might be taken, for which also much reason could be given. The right of soil to support by adjoining soil is given by our law as a natural right, and it might well have been held that this natural right to support carried with it a right to the support of all those burthens which man is accustomed to lay upon the soil. On this principle, the right to support would arise as soon as the house was built, and would exist independently of user, consent or contract. It might thus, it appears to me, be reasonable to hold that a house should never have the right of support, or that it should always have it. But I am unable to find any principle upon which to justify the acquisition of the right to support by a house independently of express covenant or grant. For casting aside all technicalities, I think that the only principle upon which rights of a kind like the one in question can be acquired is that of acquiescence. But I further think that, as he who cannot prevent cannot acquiesce, and as the owner of adjoining land cannot prevent his neighbor from erecting a house upon his own land, he can never be said to have acquiesced in the construction of that house, or in the burthen which thence results. Such are the conclusions to which I should be driven by a consideration of this question on principle. When I turn to the authorities of our law bearing on the subject, I find, as it appears to me, that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and, consequently, that the right is one which may be acquired independently of express covenant. All the efforts which I

(1) 3 B. & C., 332, 340.

(2) 2 Macq., 449.

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have made to find some principle upon which to justify the authorities, have to my own mind entirely failed.

I must now consider somewhat more in detail the views which I have thus briefly expressed. In the absence of express stipulation, rights of the kind to which the one now in question belongs, can, in my opinion, arise in law only from one or other of two sources, namely, either as incidents attached to property by nature herself, or as incidents attached to property by the force of long continued user under circumstances importing acquiescence in such user.

There is no doubt on the authorities that, as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure naturæ*, and as a proprietary right. It arises in all its force the moment two adjoining pieces of land are held by different owners and has no connection with the user of the land: *Humphries v. Brogden* (1); *Rowbotham v. Wilson* (2). But it is equally clear on the cases that the right to support of buildings by land is not a right *ex jure naturæ*, but must arise by grant (or, as I think, more accurately speaking, by covenant). "Rights of this sort," said the Court of Exchequer in reference to the right of 773 support of a house, "if they can be established at all, must, we think, have their origin in grant." (See *Partridge v. Scott* (3), and to the like effect are the judgments of the Queen's Bench in *Humphries v. Brogden* (1), and of the Exchequer Chamber in *Bonomi v. Backhouse* (4).)

That the right in question may be acquired, even where no instrument creating it is shown, is established as a matter of positive law by a series of authorities which appear to determine, 1, that the owner of an ancient building has a right of action against the owner of land adjoining, if he disturb his land so as to take away the lateral support previously afforded by that land, and 2, that the owner of a new building has no such right. The cases on these points are so fully cited and discussed by Lush, J., in the Queen's Bench Division, and by Thesiger, L.J., in the Court of Appeal, that it will be sufficient to refer to these judgments for their details. Suffice it to add that the authorities, commencing in the year 1803, include rulings at Nisi Prius by Lord Ellenborough, Lord Wensleydale, and the late Lord Chief Justice of England; an expression of opinion by Lord Blackburn, and judgments by the Courts of Exchequer and Common Pleas which assert or involve the propositions referred to: and, though no clear authority of an earlier date is found, the distinction between a new and an old house as regards the right to support appears to be hinted at in the cases of *Wilde v. Minsterley*, 15 Car. 1 (5), and of *Palmer v. Fleshees*, 15 Car. 2 (6).

These cases constitute a body of authority, which, in my opinion, must be regarded as conclusive that, according to the law of England, an ancient house possesses a right to support from the adjoining

(1) 12 Q. B., 739.

(2) 8 E. & B., 123.

(3) 8 M. & W., 228.

(4) E. B. & E., 646, 654.

(5) 2 Roll. Abr., 564, Trespass I, pl. 1.

(6) 1 Sid., 167.

ing soil; and, therefore, I answer your Lordships' first question in the affirmative.

From what I have said it follows that a right to support may, according to our law, be acquired independently of express contract; and, in order to answer your Lordships' second question, it becomes essential to inquire on what principle, in what time, and under what circumstances, it may be so acquired. Mere lapse of time can never, it appears to me, on any intelligible principle, confer a right not previously possessed; though lapse of time accompanied by inaction, where action ought to be taken, may well have such a result. "Mere lapse of time," said Chief Justice Dallas in *Gray v. Bond* (1), "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Strictly speaking the right in question cannot, I think, be prescribed for; for it is common learning that prescription can only be for incorporeal hereditaments "and cannot be for a thing which cannot be raised by grant" (2), and, as I have already shown, the right in question does not, in my opinion, lie in grant.

But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. *It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2dly, the absence of right to do that act in the person doing it; 3dly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases.

(1) 2 B. & B. 671.

(2) 2 Bl. Com., bk. ii, c. 17; 21st ed., p. 264.

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As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb.

Qui non prohibet quod prohibere potest, assentire videtur (1); per Parke, B., in *Morgan v. Thomas* (2): *Contra non valentem agere, nulla currit prescriptio* (*Pothier, Traite des Obligations*, Part iii, Chap. viii, art. 2, § 2; Broom's *Maxims*, 5th ed., 903), are two maxims which show that prescription and assent are only raised where there is a power of prohibition.

And again, the cases of *Chasemore v. Richards* (3), *Webb v. Bird* (4), and *Sturges v. Bridgman* (5), have established a principle which was stated by Willes, J., in *Webb v. Bird* (6), in these terms. After alluding to the law relative to lights as exceptional, he proceeded, "In general a man cannot establish a right by lapse of time and acquiescence against his neighbor, unless he shows that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labor and expense." "Consent or acquiescence," said Thesiger, L.J., in delivering the judgment of the Court of Appeal in *Sturges v. Bridgman* (7), "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*, for a man cannot, as a general rule, be said to consent or to acquiesce in the acquisition by his 775] neighbor of an easement through an enjoyment of which *he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

Assuming such to be the true grounds and principles of acquiescence, I next inquire how they can be applied to the question of the right of a house to be supported by the adjoining land.

It has been argued at your Lordships' bar that the doctrine applies in its simplest form to the right in question; for it has been contended that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that, therefore, time

(1) Co. Inst., 2d part, vol. i, p. 305.

(2) 8 Ex., 304.

(3) 7 H. L. C., 349.

(4) 10 C. B. (N.S.), at p. 382.

(5) 10 C. B. (N.S.), 268; 13 C. B. (N.S.), 841.

(6) 11 Ch. D., 852.

(7) 11 Ch. D., 862.

constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbor's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law no one could rightly build on the edge of his land, unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognized as lawful. Nay more, any erection of a house would give a right of action not only to the adjoining neighbors, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure when unattended with unascertainable physical consequences is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.

Is the support of the house by the adjoining soil preventible? I think not. It is of course physically possible for one man so to excavate his own soil as to let down his neighbor's building, and a man may or may not have occasion to excavate his own land for his own purposes, but such an excavation for the sole purpose of letting down a neighbor's house is of so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right. In fact in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

In the case of air it is physically possible for the adjoining owners to build a lofty wall round a windmill and shut out the access of air; and in case of underground water it would, at least in some cases, be physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such acts would require such an unreasonable waste of time and money that the not doing of them has been held to import no acquiescence in the flow of air and water respectively: *Chasemore v. Richards* (1); *Webb v. Bird* (2).

*If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventible by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing.

(*) 7 H. L. C., 349.

(*) 10 C. B. (N.S.), 268; 13 Ibid., 841.

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The right to support and the rights to the access of light and air are very similar the one to the other, and are broadly distinguished from most other easements or analogous rights. They are negative as contrasted with affirmative easements. They are analogous with *servitutes ne facias* in the civil law. Such rights when they arise spring, not from acts originally actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights; they confer on the dominant owner not the right to use the subject, but a right to forbearance on the part of the owner from using the subject, *i.e.*, they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement (1). They rest on a presumption or inference not of a grant by the neighbor of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land.

It is difficult in principle to see how such rights can arise from the doing of lawful acts on the dominant tenement, except in the few cases where the owner of the servient tenement can both lawfully and with reasonable ease interfere to prevent the continued user by his neighbor.

The close likeness between the right to support and to light has been much pressed on your Lordships, as a reason for inferring the right to support by analogy with the cases which before the Prescription Act established the right to light. The peculiarity of these cases is that the courts required the servient owner to submit to the acquisition of the right by his neighbor or to signify his dissent by putting up an actual obstruction. "If his neighbor objects to them" (*i.e.*, to the windows) said Bayley, J., in *Cross v. Lewis* (2), "he may put up an obstruction, but that is his only remedy." This rule as to light appears to have arisen without any full discussion in the courts of the principle on which it rests. But it is plain that the erection of an obstruction was thought so slight a matter that it might reasonably be demanded of the servient owner to negative acquiescence on his part. This rule I consider to be an anomaly, and therefore as not furnishing any principle which ought to be extended. "It is going very far," said Lord Wensleydale in *Chesmore v. Richards* in your Lordships' House (3), "to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years enjoyment of light passing through a window." "These cases," said Willes, J., in *Webb v. Bird* (4), "as compared with the general law are anomalous." "The case of the right to light before the statute stood on a peculiar ground," said Blackburn, J., in the same case, in the Exchequer Chamber (5). "Any one," said Bramwell, L.J., in *Bryant v. Lefever* (6), "who reads the cases relating to the acquisition of a

(1) 2 Austin, Jurisp., 836, 3d ed.

(2) 2 B. & C., 689.

(3) 7 H. L. C., 386.

(4) 10 C. B. (N.S.), 285.

(5) 13 C. B. (N.S.), 844.

(6) 4 C. P. D., 177.

right to light, will see that there has been great difficulty in establishing it on principle."

*Accordingly, in *Chasemore v. Richards* (1), your Lordships' House declined to apply the analogy drawn from lights to water passing through the earth in unascertained courses, and the Courts of Common Pleas, Exchequer Chamber, and Appeal, have declined to apply it to the cases of air (*Webb v. Bird* (2), *Bryant v. Lefever* (3)), and of noise (*Sturges v. Bridgman* (4)).

Lastly, the way in which the Prescription Act deals with the right to light is significant of its anomalous character. It deals, on the one hand, with easements of an affirmative character which are capable of interruption by the servient owner. It deals, on the other hand, not with negative easements generally, but with the right to light alone of all the class to which it belongs. I believe that this argument, derived from the law of lights, has exercised a great influence on the establishment of the right to support, but I consider that in principle it affords no justification for the establishment of such a right. In order that acquiescence may arise there must, in my opinion, be the power to prevent; and this I conclude, for the reasons I have given, is wanting in the case of the support of buildings by adjoining soil. But there is, in my humble opinion, equally wanting another element, namely, knowledge in the owner of the servient tenement. No doubt the owner of property knows or must be taken to know what occurs openly and visibly on his estate or in its immediate neighborhood, but not that which takes place underground or in a secret manner. Hence he is justly charged with knowledge that his neighbor walks habitually over his land, or has erected a house with windows deriving light over his fields: but he would not be affected with knowledge of the user of a gangway or gallery constructed in the course of secret mining operations. Now the question whether a building does or does not derive any practical support from the neighboring land is one which it appears to me often extremely difficult to answer even for the building owner, and far more difficult to answer for the adjoining owner, who may be ignorant of the nature of the structure erected behind a hoarding—of the incidence of its burden on the soil—of the depth and character of the foundations, whether extending to the rock or resting on the surface soil—and of the nature of the subsoil itself. He may indeed excavate his own land and probably answer the last of these questions; but on the other topics he has no certain means of information, except by a trespass or an impertinence. It is evident that where the building is on the outcrop of strata, or where the beds have been intersected by dykes or disturbed by faults, it would be difficult or impossible to tell what is the incidence of the burden created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbor that plain knowledge of what is going

(1) 7 H. L. C., 386.

(2) 13 C. B. (N.S.), 841.

(3) 4 C. P. D., 177.

(4) 11 Ch. D., 852.

on in his neighborhood which can alone justify the depriving a man of a right to use his own land in a lawful manner.

In the case of *Solomon v. Vintners' Company* (1) the question was as to the right of support of one house by another not immediately adjoining, on the ground of thirty years enjoyment of such support, and there Bramwell, B., made some observations which 778] seem very relevant to the present inquiry. Supposing *such a right to exist "it must," said the learned judge, "be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi, precario*, nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other, but it will be only a conjecture." "In fact it is impossible to say which house is being supported. It is true that in this case when the defendant's house was removed the plaintiff's house fell in ; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so, it would have been but a matter of conjecture. Therefore, supposing that the plaintiff for more than twenty years had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right ;" consequently, "no title was gained under any of the different ways in which it has been surmised it might have been gained." On principle I conclude, therefore, that acquiescence does not apply to the right in question.

Another argument in favor of the acquisition of the right in question has been based upon an analogy with the operation of the Statute of Limitations. "It seems to me," said Lush, J. (2), "to be the necessary consequence of the Limitation Act that such an easement" (i.e., an easement not within the Prescription Act), "should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence ; that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded in view of the necessary effect of the Limitation Act upon such an easement as this."

To the extent of holding that, if the right is to be acquired at all by lapse of time, twenty years is a reasonable period to confer the right, I think that the analogy is sound ; but beyond that it appears

(1) 4 H. & N., 602.

(2) 3 Q. B. D., 94 ; 28 Eng. R., 88.

to me not to go. The Statute of Limitations presupposes a right of action and takes it away if not put in force for twenty years; that furnishes no reason for casting a new burden upon a man where he has no capacity to bring an action or to create a physical obstruction to the exercise of the alleged right. To take away a right of action, if not put in force within a reasonable time is one thing; to take away a man's right in his property because he does not bring an action which he cannot bring, seems to be quite another thing.

The authorities which establish this existence of the right in question afford no distinct statement of the principle upon which it reposes, but there are to be found in them references to the open character of the user, to the knowledge of the servient owner, and to the lapse of time, which seem to show that some notion [779] of acquiescence was in the minds of the learned judges; but when I ask myself what difference it makes whether the user be open or secret to a man who cannot stop such user, what is the value of knowledge to a man who cannot act on it, and what is the effect of a lapse of time in the course of which nothing can be done, I find myself unable to answer these inquiries; and I think that the circumstances under which the building has been erected and the support enjoyed are immaterial. I regard the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for their existence; but as it has been established that the right in question may be acquired by the lapse of time, I think that the period of twenty years may and ought to be held a sufficient one to confer the right.

The period of twenty years was that limited by the statute 21 James I, c. 16, for bringing possessory actions and making entries; it was applied by the judges to cases of prescription, so that before the Prescription Act the uninterrupted enjoyment of an easement for that length of time was constantly held to afford a ground for presuming the necessary grant or covenant; it has been referred to in *Stansell v. Jollard*, before Ellenborough, L., in 1803 (1), in *Dodd v. Holme* (2), and in others of the authorities relative to this very right as sufficient to confer it; and it may well be maintained as reasonable in itself. I therefore answer your Lordships' second question in the affirmative.

I have already shown that I view the right in question as the result of an artificial rule of law, with which knowledge and acquiescence have nothing to do. I therefore answer your Lordships' third question by saying that in my opinion if the acts done by the defendants would have caused no damage to the plaintiff's building as it stood before the alterations made in 1849, it is not necessary to prove that the defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong.

(1) 1 Selw. N. P., 10 ed., 435, tit. Consequential Damages.

(2) 1 Ad. & E., 493.

For the reasons already given, I submit (in answer to your Lordships' fifth question) my opinion that the course taken by the learned judge at the trial of directing a verdict for the plaintiffs was correct, according to the law of England as it now stands. His conclusion involves the proposition that, by the mere act of his neighbor and the lapse of time, a man may be deprived of the lawful use of his own land, a proposition which shocks my notions of justice, and against which I have struggled, but have struggled in vain; because, as I repeat with regret, I can find no reasonable proposition on which to rest the long line of decisions on the question before your Lordships. It would be presumptuous in me to inquire how far your Lordships will be bound by this long *catena* of authorities, or free to act on reason and principle, and I therefore humbly submit to your wisdom the conflict which appears to me to exist in this important case between the two governing principles of our laws.

BOWEN, J.:—My Lords, it appears to be established by an irresistible weight of authority that an ancient house is entitled to such support from the adjacent soil as it has immemorially enjoyed. The 780] first question put to us by your Lordships *must, therefore, be answered in the affirmative. Before replying to the rest, I propose to state my view as to the nature of this right of support and the mode of its acquisition.

It has been urged upon your Lordships that the support from the adjoining land to which an ancient house is entitled is a natural right of property. In one aspect, but in one aspect only, it may be viewed as such, in so far namely as it arises out of the lawful use by a man of his own land. But in truth it also involves something beyond the natural use of a man's soil, viz., a collateral burden upon his neighbor, limiting, after a defined interval of time, the otherwise lawful use of the neighbor's own property. Under this aspect it is a right which cannot be natural, but must be acquired.

Nor is it necessary in order to account for its existence to invent the pretext of an imaginary positive law conferring the privilege as an exceptional boon on houses built before memory began. *Entia non sunt multiplicanda præter necessitatem*. A simpler explanation will suffice. That a right of support for buildings may have a lawful origin at any moment is clear, for it can be created by agreement made in due and binding form with an adjoining owner. All that the law, therefore, seems in the case of support for ancient buildings to do is to repeat the operation it performs so constantly in the case of other immemorial user. It assumes some possible lawful origin for the enjoyment prior to the dawn of legal memory. So long as the courts of common law were hampered by the barriers between law and equity, this doctrine was stated in a necessarily narrow way as if it were some "legal" origin that ought to be presumed. At the present day, when law and equity are fused, the proposition may with advantage be recast in a more liberal form,

namely, that the law will presume any *lawful*, and not merely any *legal*, origin consistent with the circumstances of the case.

A binding and irrevocable concession on the part of some adjoining owner made in bygone days, or else an arrangement effected, expressly or by implication, upon the separation of one property into two parcels, is the source to which reason turns for the requisite lawful origin of all immemorial rights which either burden a neighbor's land or curtail his natural use of it. This is the theoretical beginning of prescriptive affirmative easements. To this initial source is ascribed the ancient window light: *Aldred's Case* (1). To a similar commencement by a parity of reason, and not without the sanction of authority, may be referred the right of an "ancient" house to its immemorial support: *Partridge v. Scott* (2); *Wyatt v. Harrison* (3); *Humphries v. Brogden* (4).

Your Lordships, however, in the present appeal have to consider the character and limits of a presumption in favor of the right of support for a modern building which has been held to arise after a much shorter period of user, viz., user for twenty years. Unquestionably, in the case of affirmative easements and of window lights, after twenty years user of a special kind, a presumption of right has been sanctioned by the courts independently of and before the Prescription Act. I propose to examine its principle and nature, and, having done so, to consider whether a title by twenty years user in the case of support for buildings is merely an illustration of the same [781 rule applied to distinct subject-matter, or a rule based on any different grounds and accompanied with any other limitations.

First, then, as to affirmative easements and window lights. When enjoyment of a certain kind has existed from time immemorial, the law infers for it, as we have seen, any possible lawful origin. But user of a shorter period may well be surrounded with circumstances which will point, unless explained, to the conclusion that such user is only the enjoyment of a right. "This is founded," says Wilmut, C.J., speaking of the special case of window lights, *Lewis v. Price* (5); "on the same reason as when the lights have been immemorial; for this" (i.e., the shorter period) "is long enough to induce a presumption that there was originally some agreement between the parties."

For a considerable period in the history of English law, there may probably have been no hard and fast line as to the length of user short of the date of legal memory which would be sufficient in the case of an alleged easement to authorize the inference of a right. It is at all events certain that the twenty years limit did not make its appearance in our law till a comparatively recent date. In the reign of Queen Elizabeth, when *Pope v. Bury* (6) was decided, it had not been introduced so far as window lights were concerned, nor is there any trace of its existence up to this time in the case of

(1) 9 Co. Rep., 58.

(2) 3 M. & W., 228.

(3) 3 B. & A., 875.

(4) 12 Q. B., 749.

(5) 2 Wms. Saund., 175.

(6) Cro Eliz., 118.

any easement affirmative or negative. But in the year 1623 the statute of 21 Jac. 1, c. 16, was passed, by which entry into lands was prohibited, except within twenty years after the accruer of the right, and, as a necessary corollary, an adverse enjoyment of lands for twenty years became a bar to any action of ejectment. Easements were not and could not be treated as within the statute; but the idea of twenty years was apparently borrowed by the courts as a *quasi* parliamentary standard, for the use of judges and juries, by which to mete out a reasonable measure of time. In the case of affirmative easements the twenty years rule obviously thus began (2 Wms. Saunders, 175). It was in the same manner that the twenty years rule was applied by very slow degrees to window lights: *Lewis v. Price*; *Dougal v. Wilson*; *Darwin v. Upton*, per Buller, J. (1). It was not a positive proprietary law, for the rule at the date of *Bury v. Pope* (2) was not a part of the common law, and the judges have no power to engraft new laws on old. In truth it was nothing but a canon of evidence. In *Read v. Brookman* (3) Buller, J., speaks of it "as a rule which has been laid down respecting the length of time which shall be sufficient to raise a presumption."

Similar specimens of judge-made rules of proof are to be found in other passages of the law of evidence. If seven years elapse after a traveller has crossed the four seas without his being heard of, the presumption of the continuance of his life ceases and a counter-presumption arises that he is dead. This seven years rule has been said to be adopted by the courts in analogy to the statute 19 Car. 2, c. 6, with respect to leases dependent upon lives, and 1 Jac. 1, c. 11, with respect to bigamy. Traces, on the other hand, of some such limitation appear earlier than these statutes in the books; but whether the judge-made rule upon the subject of the continuance of life be imitated or not from the statutes of the realm, it is at best 782] a mere maxim of evidence recommending an inference *which it is for the jury to find and which may be rebutted. The original presumption that after twenty years a bond had been satisfied by payment, was in like manner a rule of evidence, first introduced, it is said, by Lord Hale, and accepted slowly and reluctantly by the courts: *Oswald v. Legh* (4). The presumption that after thirty years a document produced from the proper custody has been duly executed is another instance of such rules. In all these, the inference of which the courts approve must be drawn, not by the court, but by the jury; in none of these is the inference conclusive.

The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement. At the time when the twenty years rule was promulgated by the courts, a document under seal was the only spe-

(1) Cro. Eliz., 118.

(2) 2 Wms. Saund., 175a.

(3) 3 T. R., 159.

(4) 1 T. R., 270.

cific mode known to the common law in which an incorporeal hereditament could be created. But there are many cases in which equitable rights in the nature of an easement arise without any deed at all. There may be a binding agreement for valuable consideration not under seal. There may be stipulations which would not otherwise run against the land, but which will bind a purchaser with notice. Or there may be conduct or inaction on the part of an adjoining owner which will in equity preclude him from denying that a right in the nature of an easement has been acquired against himself. Any of these suppositions under appropriate circumstances may conceivably furnish a lawful origin of which courts of law, released in these later times from the narrow confines of a limited jurisdiction, may properly take cognizance. Even at a time when a deed was the only origin for an easement known to the common law, language is found in the judgments of the law courts suggestive of the notion that this lost deed was merely the specific form in which the lawful origin had taken shape.

It is further to be noted that the exact inference recommended by the law was not, in the case of affirmative easements, that the consent of the adjoining owner had been first given during the twenty years user, but that some lawful origin preceded the earliest act of enjoyment. The lost grant was in theory anterior to the user; it was not the shape in which the submission of the servient owner was supposed during the twenty years to mould itself: *Doe v. Reed* (1); *Moore v. Rawson* (2). In this sense it is inaccurate to speak of such rights as arising from the twenty years acquiescence of the servient owner. His acquiescence for twenty years, in the case of affirmative easements, was evidence that the right had existed previously.

It appears to be manifest, in spite of some inexact expressions of earlier judges, that this presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. This view is supported by a chain of authorities, the earliest of which are collected in 2 Wms. Saunders, 175a, and all of which have been examined and discussed in the judgments of Cockburn, L.C.J., and Brett and Thesiger, L.JJ. It must at the same time be conceded that the courts exhibited a disinclination to treat the presumption as an ordinary one. They preferred to leave it in a logical cloud, and juries were encouraged, for the sake of *quieting posses- [783 sion, to infer the existence of deeds in whose existence nobody did believe: *Eldridge v. Knott* (3). Some metaphysical industry indeed has been expended with the view of explaining how a presumption of fact might yet be hedged round with an artificial authority and prestige which would allow it to be treated as something more than a mere presumption of fact. Thus it has been argued that the imaginary deed was legal machinery only, the only question being, as was said, whether the legal consequences really incident to a valid

(1) 5 B. & Ald., 232.

(2) 3 B. & C., 339.

(3) 1 Cowp., 215.

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grant were well annexed to the state of facts disclosed by the twenty years user: *Starkie* (1). The embarrassment of the courts and of the profession appears, from the judgment of Parke, B., delivered shortly after the passing of the Prescription Act, in *Bright v. Walker* (2), and from the report of the Real Property Commissioners which preceded the passing of that statute.

But it seems a contradiction in terms to maintain that this rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant ever had been made. No case, it is true, occurs in which the presumption is recorded as having been displaced in this manner at *Nisi Prius*, though proof that no such deed could be efficacious in law was acknowledged to put an end to the presumption. But the reasoning of Brett, L.J., in the Court of Appeal in this case, seems to me to show what would, before the recent fusion of law and equity, have been the necessary result of positive disproof of the supposed deed, though I think, with deference, that he overlooks the altered condition of the problem due to the modern recognition in courts of law of equitable rights. And with regard to the law as it formerly existed, the fact that the presumption, in the reign of Queen Elizabeth, was unknown, proves, I submit, to demonstration, that it is at most an artificial canon of evidence and nothing more. In *Darwin v. Upton* (3), Gould, J., explains its nature by the illustration of a demand and refusal which, in an action in trover, are evidence of a conversion, but not the conversion itself. It has always been the law that this evidence of conversion is for the jury, and that if a jury find simply a demand and refusal, the courts have no power as a matter of law to infer a conversion: *Vaughan v. Watt* (4); *Chancellor of Oxford's Case* (5); *Starkie* (6).

The question, so far as lost grants and lost covenants are involved, seems to me to have lost much of its practical importance, owing to recent changes in the law. It would not now be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well.*

Such is the history and character of the twenty years' rule as applied to affirmative easements, and further to the negative easement of the window light. Is there any valid reason to doubt that such also is its history and explanation as applied to the claim of support for modern buildings? The presumption raised in cases of support to buildings by the shorter user of twenty years, is modelled upon the presumption growing out of immemorial enjoyment. The one presumption is the echo at a distance of the other. The distinction is, **784** that the shorter *period gives rise to a rebuttable, the longer to an irresistible inference. What necessity is there for inventing the hypothesis of some positive law in virtue of which in some special

(1) 3 Stark. Ev., 928, ed. 1842.

(2) 1 C. M. & R., 221.

(3) 2 Wms. Saund., 175a.

(4) 6 M. & W., 492.

(5) 10 Co. Rep., 57.

(6) 3 Stark. Ev., 1160, ed. 1842.

way a house after twenty years' user is to be clothed with an absolute right to support as if it were an ancient house? The objection to this theory is always the same. Such a positive law apparently did not exist prior to the statute of James. Judges have had no power to create it since.

There are unquestionably certain broad differences between affirmative easements and the negative easement of a window light. There are differences between the window light and the right of a modern house to support from the adjoining soil. In the first place, it is true that the window light, unlike a right of way, does not begin in acts of enjoyment which are *prima facie* an encroachment upon the neighbor's soil. "It is acquired," says Littledale, J., in *Moore v. Rawson* (1), "by occupancy." It is acquired, that is to say, by occupancy upon one's own soil as distinct from user upon another's and without any *necessity*, therefore, to assume that the occupancy is *preceded* by a grant. But a consensual origin at one time or another, in the case of a title to window lights, the law still implies: *Lewis v. Price* (2); *Cross v. Lewis* (3).

The right to support for buildings from the neighboring land is more allied in some ways than the window light to the class of affirmative easements. The man who uses his neighbor's soil for the support of his house affects his neighbor's land more tangibly than the man who opens a window to overlook it. In the instance of the building which is supported we have a direct lateral pressure upon the adjoining soil. There is certainly no case which decides that this pressure gives a right of action on the neighbor's part, and practical reasons of convenience may be adduced against such a surmise, although it might perhaps be argued that an action ought on principle to lie against, and an injunction be obtainable to restrain, the man who is actually availing himself of his neighbor's soil and using it in a manner which in twenty years will be evidence of the acquisition of a right so to do. But assuming from the silence of the books that no right of action is created by the adverse enjoyment of support for buildings, the right to support may none the less be a negative easement like light, and capable of a similar origin. It is on the theory of agreement made at some time or another between the neighbors that the right to support is based in the case of an ancient house. Borrowing the argument used as to lights by Wilmot, C.J., we may say that the twenty years' rule is "founded on the same reason" as the immemorial title.

If, however, authority be needed in support of reason for the view that the neighbor's presumed consent is the foundation of the modern as well as the ancient title to support for buildings, it will be found in the language of the courts in various cases: *Partridge v. Scott* (4); *Humphries v. Brogden* (5); *Bonomi v. Backhouse* (6).

Nor can I admit that any reason exists why in the case of support

(1) 3 B. & C., 332.

(2) 2 Wms. Saund., 175.

(3) 2 B. & C., 689.

(4) 3 M. & W., 228.

(5) 12 Q. B., 739.

(6) E. B. & E., 646, 654.

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to buildings the same doctrines should not regulate the quality and nature of the user required as apply to the mode of acquisition of 785] affirmative easements and of light. *Some conditions there surely must be determining the character of the enjoyment. If it be otherwise, the case of support to buildings so far from being analogous to the case of lights, as Lord Ellenborough and others have called it, is an anomaly without parallel in English law. For mere possession is, as a rule, inadequate to create by lapse of time an adverse right which is to limit a neighbor's enjoyment of his property. "Mere lapse of time," says Dallas, C.J., in *Gray v. Bond* (1), "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Such too was the principle of the Roman law. The cantilena *nec clam, nec vi, nec precario* is a doctrine not peculiar to affirmative easements, though we are chiefly familiar with it in that chapter of the law of England. It seems in truth a natural condition of any inchoate user which is to mature by length of time and apart from statute into the presumption of a right acquired at a neighbor's expense. Whatever may be the peculiarities of the right of support to buildings as contrasted with ordinary easements, and I admit that such exist, why should the generic maxim *nec vi, nec clam, nec precario* be discarded as inappropriate when we come to deal with support to buildings?

It is no doubt urged that the right to such support differs from all other acquired rights in this, that the enjoyment of support by a building cannot be reasonably interrupted. This cannot be true always, even if it is true at times. There may be circumstances in which any interruption of the modern building's support would be attended with great expense and even danger to the property of the servient owner. But is there any distinction in this respect between the window light and the right of support except what may be called a distinction of degree? In some instances it is easy to interrupt the enjoyment of both. In some it will be difficult to interfere with either. Circumstances may be conceived in which it would be as serious an enterprise to block out a light as to withdraw the support of the house. Yet there can scarcely be an instance in the case of either in which the interruption would not be physically possible if it were worth the necessary trouble and expense. The difficulty of interrupting percolating water is of a wholly different kind, and far more insurmountable. But admitting that physical possibility or impossibility of interruption may not be the test, and that no right of support ought to arise by lapse of time where interruption is not practically feasible it follows, *not* that a right of support for buildings can never be acquired as ordinary easements are, but merely that a right of support for buildings cannot always and under all circumstances be acquired. In like manner our law has distin-

(1) 2 B. & B., 671.

guished between that access of air, light, and wind which is definite and can be interrupted, and that access of air, light, and wind which is indefinite, incapable of interruption, and which accordingly never grows into a right.

If, indeed, the law recognized no such thing as the right of support to buildings as it recognizes no rights to the access of percolating subterranean water, there might be good grounds for saying that the possibilities of interrupting a building's support were possibilities of which the law took no account; but the contrary is the case. The law of England treats the right of support for buildings as a *right perfectly susceptible of acquisition, and it does so, I [796 conceive, upon the very ground that the enjoyment can usually as a fact be interrupted, even though interruption may be very inconvenient. "Although," says Lord Campbell in *Humphries v. Brogden* (1), "there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man, and acquiesced in by another who has the power to interrupt them; and as on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." This is a considered judgment of Lord Campbell and Patteson, Coleridge, and Erle, JJ. They distinctly refer the right of support for the modern building to the hypothesis of a modern covenant, and do so on the express ground that the adjoining owner can in fact interrupt the user, expensive or inconvenient as the interruption may be. To assume, indeed, that interruption in such cases is out of the question, and that a right nevertheless is gained by user, would be to make the right of support for buildings a right at variance with all the principles of English law. Nor would the difficulty be avoided by calling it a law of property. This would be only creating for its benefit a new class in the category of rights of which it will be a solitary member. To say, on the other hand, that the courts have created such a doctrine without rhyme or reason, is to do scant justice to the great authority of the Common Law Courts of past ages. Surely it is simpler to believe that the law deals with support to buildings as with light, considers it an enjoyment capable on the whole of interruption, and capable therefore of ripening into a right where interruption does not occur. It might, perhaps, be added with some show of reason that the user ought, if the analogy of lights and other easements were to be followed, to be neither violent nor contentious. The neighbor, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakable protests

(1) 12 Q. B., at p. 749.

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to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton v. Swansea Waterworks Company* (1).

I am aware that this view is not one that has been laid down in any decided case. On the contrary, it has been said that in the case of window lights, the only manner in which enjoyment could be defeated before the Prescription Act was by physical obstruction of the light. But for the language of some of the judges, one might well hesitate with Lord Wensleydale, in *Chasemore v. Richards* (2), in accepting this statement of the law as reasonable. Such was not the doctrine of the civil law, nor the interpretation which it placed upon the term "*non vi*," but the difficulty at any rate is not greater with respect to the right of support than that which might easily, up to the passing of the Prescription Act, have occurred in the analogous case of a window. If in any particular instance interruption is impracticable, and if perpetual protests in such instances are also legally useless, there is no necessity that I know of in law or in sense [787] to *assert that any right will in that special instance be the consequence of non-interruption. I am not, however, aware that in the case of *Angus v. Dalton*, which is now before your Lordships, it ever was or could be suggested that the enjoyment of support was in any degree incapable of interruption.

Finally, why should not the condition be recognized in cases of support for buildings which prescribes that the user must be open? In the negative easement of the window light the condition is no doubt almost necessarily fulfilled. The adjoining owner, if he is a person capable in law of being affected by adverse user, has notice either by himself or his agents of the construction of the window. Probably with respect to support the character of the building and the nature of the soil often afford an equal notice to the adjoining owner of the enjoyment, out of which a right is developing; but I do not regard actual notice to the adjoining owner as the crucial point: *Cross v. Lewis* (3). The publicity or openness of the enjoyment seems to me the real test. Without this publicity the quality of the user cannot be such as is uniformly required to raise the inference of an acquired right. If there be peculiarities in the construction of the building which render the enjoyment secret, the user is not strictly adverse. It is said that it would be an idle ceremony to acquaint a neighbor with the fact of an user which he cannot reasonably prevent. I have already stated what seems to me to be the real value of the argument drawn from the supposed difficulties of interruption. It must not, however, be forgotten that the real question is what is the quality of the user? Has it been an enjoyment in the face of day which reasonable neighbors might see and understand? If so, the presumption arises that it is of right, whether such right has been conceded during the twenty years user or at any previous time.

(1) 17 Q. B., 267.

(2) 7 H. L. C., 386.

(3) 2 B. & C., 686.

It has been asked whether a man, whenever he increases the internal weight of portions of his house, is bound to give notice to his neighbors. But if, by the increased weight, he is seeking to acquire additional rights against the neighbor, the analogy of all law would appear to demand that his enjoyment should be open. There is no abstract difficulty in leaving it to the jury to say whether the conditions of publicity have in fact been fulfilled. Your Lordships have been told indeed in argument at the bar that to submit such questions to the jury would be to render titles of adjacent owners insecure and dependent on matters of much nicety. The danger would not be so great as is assumed, for in most of such cases a right to some support will *ex hypothesi* have been acquired, and adjoining owners will not be able easily to do wanton mischief. Nevertheless, the suggested danger, if it exists at all, ought not to be overlooked. But it can readily be cured by legislation. All that is needed is to bring into the existing Prescription Act the omitted case, if omitted it really has been, of a claim to support for buildings, and to deal with it as window lights have been dealt with.

If the user complies with the necessary conditions, the presumption, after twenty years, of some lawful origin, will arise. A case thus *prima facie* established may be met in two ways. The defendant may disprove the user or its quality; or in the last resort he may, if he can, while admitting the user attempt to answer the presumption of some lawful origin, a task which he will find difficult *in practice, inasmuch as mere proof of the absence of any [788 covenant under seal, for the reason I have above indicated, will not any longer, since the fusion of law and equity, cover the necessary ground.

The above, I submit, is a fair account of the law as regards the claim to support for a modern house, and of the application to such a claim of the twenty years rule. The adaptation of the twenty years rule to the case of support to buildings has no doubt been slow. It has been accepted gradually and with hesitation, a fact which of itself bears testimony to the soundness of the view that it is no part of the positive law of property. Its application to the case of lights was equally gradual, for the rule as to lights had not become stereotyped up to the beginning of the reign of George III. (See *Lewis v. Price* (1)). The twenty years rule as to the presumed satisfaction of bonds also grew into force by slow degrees. But I think that there is an ample weight of authority to show that in cases of support to buildings, such a rule now at last prevails, and that it can be applied in substantial accordance with the general principles of the law of easements. Yet even if the case of support for buildings differs materially from all easements affirmative or negative, if it stands alone by itself as a separate species of pseudo easement, can it on the other hand be doubted that the twenty years rule as found in connection with it is really the same presumptive rule which

(1) 2 Wms. Saund., 175a.

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Dalton v. Angus.

H.L. (E.)

governs easements in general, and that it is the doctrine applicable to the acquisition of easements which the law of England has chosen to adapt to the special, and in some ways the anomalous case of support to a modern building.

Against the above view has been placed the language of Lord Wensleydale and Lord Cranworth in the case of *Backhouse v. Bonomi*. "I think it perfectly clear," says Lord Wensleydale (1), "that the right in this case was not in the nature of an easement, but that the right was to an enjoyment of his own property, and that the obligation was cast on the owner of the neighboring property not to interrupt that enjoyment."

I have already considered to what extent and in what sense the right to support for buildings is a right to use a man's own property; to what extent it also involves a collateral title to impede the neighbor in the natural use of the neighbor's own. It is to this important distinction between the case of support to houses and the case of an ordinary affirmative easement that Lord Wensleydale and Lord Cranworth appear to me to be referring, and a similar criticism applies to like expressions which at times have fallen from other judges. *Backhouse v. Bonomi* (1) was in any event a case which proceeded on the basis of the existence in that special instance of the full right under discussion. The arbitrator had found all and every lawful origin which in law could create it. Whether the right when created arose from the presumption of a grant or from some imaginary law of property was not therefore necessarily in question.

In *Stansell v. Jollard* (2) the character of the user does not seem to have been disputed nor the presumption challenged. Lord Ellenborough indeed places the origin of support and lights on the same footing. He merely held that "Where, as in the case before the court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, by analogy to the case of lights, 789] he *had acquired a right to support." If the right of support is indeed analogous to the right to a window light, then the law would seem to be such as I have argued that it is.

Nor in *Hide v. Thornborough* (3) did any question apparently occur as to the quality of the user, nor was any attempt made to disprove the presumption. Here, again, the right was taken as having arisen, if it was a right acknowledged by the law. "If," said Parke, B., "there was twenty years enjoyment by the plaintiff of the support of his house from the neighbor's land, and *it was known* that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support." This is but recognizing the proposition that the user must be open. In *Partridge v. Scott* (4), the right is ascribed to the idea of a grant which ought not, at common law, says Alderson, B., to be inferred from any lapse of time short of twenty years after the defendants might have been or were

(1) 9 H. L. C., 503.

(2) 2 C. & K., 260.

(3) 1 Selw. N. P., 11th ed., 457.

(4) 3 M. & W., 220.

fully aware of the facts. I abstain from reviewing at length the other cases which bear on this point, as they have been abundantly examined by Thesiger, L.J., in the Court of Appeal below.

I now proceed to apply the above reasoning to the questions put by your Lordships.

1. This question I have already answered in the affirmative.

2. The period during which the house had stood was sufficient to give the plaintiff the same right as if his house was ancient, provided the enjoyment fulfilled the conditions I have described, and provided it was not shown by the defendant that the right had no lawful origin.

3. It was necessary to prove that the plaintiff had openly enjoyed the additional support rendered necessary by his alterations. It would of course be an open enjoyment if the defendants or their predecessors in title had express knowledge or notice of the alterations and of their character. But the enjoyment of the additional support would also be open if the appearance of the altered building was such as to afford a reasonable indication to the adjoining owner of the alterations that had taken place. Except to this extent it was not necessary in my opinion to prove either knowledge or notice to the adjoining owner.

4. If the alterations were openly enjoyed, I do not think it would be necessary also to prove knowledge of the effect of the alterations.

5. The course taken by the learned judge seems to me to have been wrong. It should, I submit, have been left to the jury to find whether the enjoyment was in fact open. I may add that I consider this would be the correct ruling at *Nisi Prius*, whether the right acquired after twenty years user be a right of property or a right acquired as I have described, for I do not regard the doctrine *nec vi, nec clam, nec precario* as necessarily peculiar to the law of affirmative easements. The law as to the quality of the user required to raise the presumption, and as to the rebuttable character of the presumption when raised should, I submit, be laid down as I have indicated. The exact forms of the questions for the jury would depend on the issues arising out of the defendants' case. I think that the learned judge was premature in assuming that no issues under the circumstances were likely to arise. One already had arisen upon the admitted facts, viz., whether the user was open or the reverse.

*The House took time to consider.

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1881. June 14. LORD COLERIDGE: My Lords, in this case I have had the great advantage of reading the printed judgments prepared by my noble and learned friend the Lord Chancellor, and by noble and learned friend opposite (Lord Blackburn). I had prepared a judgment of my own, but I have found that it would add nothing to what is about to be said, and much better said, by my noble and learned friends. I therefore content myself with saying that I en-

tirely concur in the conclusions at which they have arrived, and in the reasons which they have given for them. I have to thank my noble and learned friend on the woolsack for allowing me to say this at once, as I have to be elsewhere.

THE LORD CHANCELLOR (Lord Selborne): My Lords, your Lordships are much indebted to the learned judges by whom you have been assisted in this case for their careful and valuable opinions, in which the authorities have been fully examined. I do not myself propose to refer to those authorities, except so far as they seem to me to bear upon principles which have been brought into controversy, and as to which the learned judges (even when they concur as to the practical result) are not agreed.

The questions upon these appeals may be reduced, shortly, to two:—The first, whether a right to lateral support from adjoining land can be acquired by twenty-seven years' uninterrupted enjoyment for a building proved to have been newly erected at the commencement of that time; the second, whether (if so) there was anything in the circumstances of this case, as appearing in the evidence, sufficient either to disprove the acquisition of such a right, or to make it dependent upon some question of fact, which ought to have been submitted to the jury.

There was another point, made by both the petitions of appeal, which I only mention, lest it should appear to have been overlooked. The action was brought by reason of the falling of the plaintiffs' house through the excavation of the adjoining land of the commissioners, in the course of certain [791] works executed for *them by the appellant Dalton, under a contract, and for Dalton by sub-contractors. The commissioners disputed their liability for the acts of Dalton, and Dalton disputed his liability for the acts of his sub-contractors. The same point arose, under very similar circumstances, in *Bower v. Peate* (¹), and was decided adversely to the contention of the appellants. It follows from that decision (as to the correctness of which I agree with both the courts below) that, if the plaintiffs are entitled to recover at all, they are entitled to recover against both the commissioners and Dalton.

I proceed to consider the principal questions in the case.

In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided

(¹) 1 Q. B. D., 321; 16 Eng. R., 374.

in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*. This is all that I understand to be meant by those passages of the judgments in *Humphries v. Brogden* (¹), *Rowbotham v. Wilson* (²), *Bonomi v. Backhouse* (³), and *Backhouse v. Bonomi* (⁴), to which some of the learned judges who assisted your Lordships have referred.

In these cases, or in some of them, there were buildings upon the land; but no separate question was raised as to the support necessary for the buildings, as distinguished from that necessary for the land; and the doctrine laid down must, in my opinion, be *understood of land without refer- [792] ence to buildings. Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbor's land, which (naturally) would be free from it. This distinction (and, at the same time, its proper limit) was pointed out by Willes, J., in *Bonomi v. Backhouse* (⁵), where he said, "The right to support of land and the right to support of buildings stand upon different footings, as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant (see *Caledonian Railway Company v. Sprot* (⁶): whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same." Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has

(¹) 12 Q. B., 744.

(²) 8 E. & B., 142, 146, 151.

(³) 1 E. B. & E., 689, 642, 644.

(⁴) 9 H. L. C., 512, 513.

(⁵) 1 E. B. & E., 655.

(⁶) 2 Macq., 449.

granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by Lord Campbell in *Humphries v. Brogden* ⁽¹⁾; though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water, the easement of the riparian landowner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, *i.e.*, it must be established by prescription or grant.

If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, 793] *and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or "flats," separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or "flat" is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself: *Caledonian Railway Company v. Sprot* ⁽²⁾.

I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with Lindley, J., and Bowen, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of

⁽¹⁾ 12 Q. B., 742.

⁽²⁾ 2 Macq., 449.

the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

Lord Campbell, in *Humphries v. Brogden* (¹), referred to the servitude *oneris ferendi* (applied in the law of Scotland to a house divided into "flats" belonging to different owners), as apt to illustrate the general law of vertical support. The servitude so denominated (*ut vicinus onera vicini sustineat*) in the Roman law was exclusively "urban," that is, relative to buildings, whether in town or country; and the instances of it given in the Digest refer *to rights of [794 support acquired by one proprietor for his building, or part of it, upon walls belonging to an adjoining proprietor: Inst. lib. 2, tit. 3; Dig. lib. 8, tit. 2, sects. 24, 25, 33; also tit. 5, sects. 6, 8. But, in principle, the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partly rest, or against land from which lateral or vertical support is necessary for the safety and stability of that structure.

These principles go far, in my opinion, to establish, as a necessary consequence, that such a right of support may be gained by prescription. Some of the learned judges appear to think otherwise, and to doubt whether it could be the subject of grant. For that doubt I am unable to perceive any sufficient foundation. Littledale, J., in *Moore v. Rawson* (²), spoke of the right to *light* as being properly the subject, not of grant, but of covenant. If he had said (which he did not), that a right to light could not be granted, in the sense of the word "grant" necessary for prescription, I should have doubted the correctness of the opinion, notwithstanding the great learning of that eminent judge. Although the general access of light from the heavens to the earth is indefinite, the light which enters a building by particular apertures does and must pass over the adjoining land in a course which, though not visibly defined, is really certain, and, in that sense, definite. Why should it be impossible for the owner of the adjoining land to grant a right of unobstructed passage over it for that light in that course? The term "ancient" light seems to me itself to imply that such a right might be acquired by prescription. But, however this may be, the opinion of Littledale, J., is stated by him in words which (unless I misunderstand the true nature

(¹) 12 Q. B., 756.

34 ENG. REP.

(²) 8 B. & C., 840.

of support) do not apply to that easement. "A right of common" (he says) "or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant; yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant, which the law would imply, not to interrupt the free use of the light and air." 795]. *The pressure of the dominant tenement, in the case of support, is *upon* the soil of another man's land, and I can see no material difference between this and "something positive done or used *in* the soil of another man's land." Willes, J., in *Bonomi v. Backhouse* (1), when delivering the unanimous judgment of the Court of Exchequer Chamber, said that "the right to support of buildings" not only might, but "*must* be founded upon prescription or grant, express or implied." Bramwell, B., in *Rowbotham v. Wilson* (2), said, "I am of opinion that it is competent to the owner of land, on or after the severance of the mines, to grant to the grantee of the mines the right to damage the surface. I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts, and work, there may not be such a grant as that contended for here" (*i.e.*, the right to *take away* support from the surface). "Nor can I see how, if a *grant* of the right of unobstructed light and air, or of *support of the soil*, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. My Brother Hayes said, presumed grants of windows and of support were idle fictions which ought never to have been invented; perhaps so, but the fact that they were shows that the inventors and everybody else supposed that *real grants of such a nature would be good*." The rule as to prescription is thus stated in Sir Francis North's argument in *Potter v. North* (3): "The law allows prescriptions but in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by showing of a grant; therefore, upon usage *temps dont*, &c., the law presumes a grant and a lawful beginning, and allows such usage for a good title; but still it is but in supply of the loss of a grant; and, therefore, for such things *as can have no lawful beginning*, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good." Ashhurst, J., in *Lord*

(1) 1 E. B. & E., 635.

(2) 8 E. & B., 147.

(3) 1 Vent., 387.

Pelham v. Pickersgill ⁽¹⁾, laid it down as the general rule, that "every prescription is good, if by any possibility it can be supposed to have had a legal commencement." Be the theory what it may, its true foundation, in point of fact, is that which the Romans called *"*usucapio*," under [796 the conditions defined by Sir Edward Coke. "Both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage, and time. Possession must have three qualities, it must be long, continual, and peaceable, for it is said, *transferunter dominia, sine titulo et traditione, per usucapionem, scilicet per longam, continuam, et pacificam possessionem. Longa, i.e., per spatium temporis per legem definitum. . . . Continuum, dico, ita quod non sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. . . . Longus usus, nec per vim, nec clam, nec percario*" ⁽²⁾. (The Latin is from Bracton.) All these conditions are capable, in my judgment, of being fulfilled as to the right of support to buildings, and, when they are fulfilled, I am unable to understand why the right should not be held to be prescriptively established.

The policy and purpose of the law on which both prescription and the presumptions which have supplied its place, when length of possession has been less than immemorial, rest, would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be *conveniently* practicable. I assume, for the present purpose, that a man who places on his own land, where it adjoins that of his neighbor, a weight which increases its pressure upon his neighbor's land, is not thereby guilty of an actionable wrong. If this be so, the reason probably is, that the act is lawfully done upon his own land, and that the owner of the adjoining land suffers no actual or appreciable damage from the increased amount of pressure which it has to bear, except so far as the continuance of that pressure, if uninterrupted, may tend to ripen into a right, and so to enlarge the servitude to which this land was previously subject. But against this he has his own remedy, if he chooses to prevent and interrupt it. That power of resistance by interruption does and must in all such cases exist, otherwise no question like the present could arise. It is true that in *some [797

⁽¹⁾ 1 T. R., 667.

⁽²⁾ 1 Co. Lit., 118 b, 114 a.

cases (of which the present is an example) a man acting with a reasonable regard to his own interest would never exercise it for the mere purpose of preventing his neighbor from enlarging or extending such a servitude. But, on the other hand, it would not be reasonably consistent with the policy of the law in favor of possessory titles, that they should depend, in each particular case, upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience), when a man wishes, and finds it for his interest, to make such a use of his own land as will have that effect. So long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time (whenever his views of his own interest may have undergone a change), to destroy the fruits of his neighbor's diligence, industry, and expenditure.

The law of ancient lights, as it stood before the Prescription Act, was a stronger example of the application of these principles; the easement in that case being more purely negative. I cannot agree with those who think that law too exceptional and anomalous to furnish an analogy, or exemplify a principle, applicable to any other case. The servitude *non altius tollendi, ne luminibus officiatur*, was as well known to the Roman jurisprudence as the servitude *oneris ferendi*, or any other; and, if natural and not only technical reasons are to be regarded, it is difficult to conceive anything more needful for the comfort of life and enjoyment of house property than the unobstructed enjoyment of light. There is no actionable wrong done by opening new lights which overlook a neighbor's land; and to obstruct them, by building or erecting hoardings on that land, when there is no other motive for doing so than to prevent them from ripening into an easement, is as seldom likely to be conveniently practicable as the obstruction of the vertical or lateral support of buildings by excavation or otherwise. But these have not been regarded as sufficient reasons why 798] *the right to light should not be gained by an enjoyment and user for more than twenty years.

From the view which I take of the nature of the right of support, that it is an easement, not purely negative, capable

of being granted, and also capable of being interrupted, it seems to me to follow that it must be within the 2d section of the Prescription Act (2 & 3 Will. 4, c. 71), unless that section is confined (as Erle, C.J., in *Webb v. Bird*(¹), appears to have thought) to rights of way and rights of water. The opinion to that effect expressed by that eminent judge, was not necessary for the decision of *Webb v. Bird*(¹), nor can I perceive that any concurrence in it was expressed by Willes, J., and Byles, J., who agreed in the decision. The point then determined (as I understand it) was, that a claim to have free access for all the winds of heaven to the sails of a windmill was too large and indefinite in its nature to be acquired by use or to be capable of interruption, within the meaning of the 2d section of the Prescription Act. That determination I assume to have been correct. But I do not think it possible, without a degree of violence to the express terms of the act, for which neither its context nor its policy (as expressed in the preamble) affords any justification, to restrict the operation of the 2d section to "the two descriptions of easement therein specified, viz., the right to a way or watercourse." The expressed policy of the act is large and general; it is to prevent claims of prescription from being defeated by showing a commencement within time of legal memory. Why should not this extend to other easements besides ways and water rights, and lights, which (by the 3d section) are specially provided for, and exceptionally favored? In terms the 2d section extends to every claim which could be "lawfully made at the common law by custom, prescription, or grant, to any way, or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water." The interjection of the words, "or other easement," between ways and watercourses may seem singular, but I cannot think that they ought therefore to be reduced to silence, or arbitrarily limited. If any explanation of the place in which they occur is necessary, it may, I think, *be found [799 in the separate mention, which follows, of "land" and "water." *Reddendo singula singulis*, the words (as it seems to me) may be read thus, "Any way or other easement to be enjoyed or derived upon, over, or from any land, or any watercourse, or use of water to be enjoyed or derived upon, over, or from any water." So reading them, they would include (unless there is something else in the statute to exclude it, and I find nothing) the easement of support.

I am not insensible to the probability that there may be

(¹) 10 C. B. (N.S.), 282.

some error in an opinion which seems to be opposed to that of all the learned judges in both the courts below, and of most of those by whom your Lordships have been assisted on this occasion. They did not at all advert to the Prescription Act, but, of those who did, Lindley, J., was, I think, the only one who expressed any doubt. The opinions of those learned judges may possibly have been, in some degree, influenced by what was said by so distinguished a judge as Erle, C.J., in the case of *Webb v. Bird* (*), which was cited for this purpose by Lush, J. To those who considered that the right of support was not an easement, or that it was of so purely negative a character as to be incapable of being granted, or of being interrupted, within the meaning of the statute, the conclusion that the statute did not apply to it would naturally follow. I have already stated my reasons for not assenting to those premises. The point may probably not now require decision; because the same practical conclusion may be reached by your Lordships (as it has been by all the learned judges, except the late Lord Chief Justice of England, Mellor, J., and Brett, L.J.), by a different road. But, having regard to its possible importance in other cases, I have not thought it right to withhold the expression of the opinion which, after much consideration, I have myself formed upon it.

Assuming the statute to apply, what would be its effect? The late Lord Chief Justice of England thought it would be nugatory. "It was passed" (his Lordship said) "with the view of putting an end to the scandal on the administration of justice which arose from forcing the consciences of juries," to find that there had been a lost grant, when "the 800] presumption was known to be a *mere fiction (*)." But he nevertheless concluded (*) that, except in the case of light, "as regards the effect of twenty years user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the act," a conclusion extending as much to those rights of way, &c., which are expressly mentioned in the 2d section, as to "other easements."

It is undoubtedly true that, under the 2d section, there is an important difference between a forty years' and a twenty years' user. Forty years' user has the same effect which (under the 3d section) twenty years' user has to light; it makes the right absolute and indefeasible, unless it is shown to have been enjoyed by consent or agreement in writing.

(*) 10 C. B. (N.S.), 282.

(*) 3 Q. B. D., at p. 105; 28 Eng. R., 98.

(*) 3 Q. B. D., at p. 119; 28 Eng. R., 111.

But twenty years' user, under the 2d section, may be defeated "in any other way by which" it was previously (*i.e.*, before the 1st of August, 1832) "liable to be defeated," except that it can no longer be defeated or destroyed "by showing only that it was first enjoyed at any time prior to such period of twenty years." The effect of this, as I understand it, is to apply the law of prescription, properly so called, to an easement enjoyed as of right for twenty years, subject to all defences to which a claim by prescription would previously have been open, except that of showing a commencement within time of legal memory. To allege that there was no evidence from which a grant could be presumed, or that there was evidence from which it ought to be inferred that there was, in fact, no grant, would not (as I understand the law) have been, before the 1st of August, 1832, a competent mode of defeating or destroying any claim to an easement *by prescription*, and no jury would have been directed to find a grant in any such case, when there was no proof of a commencement within time of legal memory. The section, therefore (assuming it to apply), would in the present case be sufficient to establish a title by prescription to the right claimed by the plaintiffs, unless it had been enjoyed *vi*, or *clam*, or *precario*. Of *vi*, or *precario*, there is here no question.

Supposing, however, that the 2d section of the Prescription Act ought not to be held to apply to the easement of support, the *same result would practically be [80] reached by the doctrine, that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by Lush, J., by the majority of the judges in the Court of Appeal, and by all the learned judges who attended this House (unless Bowen, J., who preferred to rely upon the equitable doctrine of acquiescence, is an exception) in their answer to the first two questions proposed to them by your Lordships.

Upon the other three questions proposed to the learned judges, which involve the doctrine of *clam*, as applied to the easement of support, there has been much difference of opinion; four of the learned judges being in the plaintiff's favor, and the other three thinking that the jury were not properly directed on that point.

The inquiry on this part of the case is, as to the nature and extent of the knowledge or means of knowledge which a man ought to be shown to possess, against whom a right of support for another man's building is claimed. He can-

not resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When (as in the present case) a private dwelling house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary 802] that he should have particular *information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material, he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shown to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen, whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is in my opinion enough, if the adjoining proprietor makes no inquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question on this point which ought to have been submitted to the jury.

My opinion, therefore, upon the whole case is in favor of the respondents, the plaintiffs in the action, and against the appellants; and the motion which I have to make to your Lordships is, that the judgment of the court below be affirmed, and the appeal dismissed with costs. The effect of this will be, that judgment will stand for the plaintiffs, for £1,943, the amount of damages assessed by the special referee; the defendants not having elected to take a new trial within the time allowed them by the order of the Lords Justices; and which option was more than, according to the view which I take of this case, they were entitled to.

LORD PENZANCE: My Lords, in dealing with the questions of law to which the present case gives rise, it is material to bear in mind that the exact proposition which the appellants call upon your Lordships *to repudiate, [803 or affirm, is to be found in the ruling at the trial given by the learned judge. It is in these words: "The authorities oblige me to hold, that when a building has stood for twenty years it has acquired a right to the support of the adjacent land, and I do not think that it all depends upon whether the opposite or adjacent neighbor had notice, or not, of what was done, or what weight was put upon it, nor does it rest on the fact of there being an implied grant. I think it has become absolute law, that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil; and no one has a right to take all that soil without putting an equivalent to sustain the building. That is the ruling which I must lay down here, because that is upheld by many authorities" ('). Your Lordships have now to say whether this view of the authorities is a correct one; and, with some reluctance, I feel constrained to say that in my opinion it is so. I say with some reluctance, not because I think that the support which the plaintiff claims for his house is unreasonable, or inequitable, but because the circumstances under which the claim is held to arise, are, so far as I am able to discover, incapable of giving rise to it in accordance with any known principle of law.

It must be borne in mind both what the claim is, and what it is not. It is not a claim asserted for the support of a house by the adjacent soil as soon as that house is built; but a claim that when the house has stood "for twenty years supported by the adjacent soil it has by absolute law acquired a right to the support of the soil;" and this not by reason of any implied grant, and quite independently

(') Printed Papers, Appendix, p. 69.

of whether "the opposite or adjacent neighbor had notice or not of what was done or what weight was put upon" the ground to which the lateral support was required.

It is this sudden starting into existence of a right which did not exist the day before the twenty years expired, without reference to any presumption of acquiescence by the neighbor (to which the lapse of that period of time without interruption on his part might naturally give rise) which I find it impossible to reconcile with legal principles. I find myself therefore in entire accord with the opinion which 804] Fry, J., has offered to the House; and he *has so fully and ably illustrated his views on the subject, which are also mine, that I have little to add.

If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbor's house to the ground. It would be, I think, no unreasonable application of the principle "*sic utere tuo ut alienum non lædas*" to hold, that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbor. A burden would no doubt be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal, and regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership.

But the matter is not *res integra*. It has been the subject of legal decisions, and those decisions leave it beyond doubt that such is not the law of England. On the contrary it is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbor's house, if supported by it, to fall in ruins to the ground. This being so, and these being his legal rights (the rights incident to his ownership), it seems to me that these rights must remain to him, or those who come after him, for all time, unless he, or they, have done something by which these rights have been divested, restricted, or impaired. I find it impossible to conceive, within the application of any legal principles, that mere lapse of time can divest him or them of the rights

they once had. Legal rights do not perish by lapse of time, but rather grow confirmed. What I mean to express is this, that the right to excavate the neighboring soil not being impaired or restricted by the house being built, anything which afterwards impairs or restricts it must proceed from those who possess that right, and cannot come about, all things remaining unchanged, by the mere efflux of time.

*In all the cases in which lapse of time is held to [805 stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent, and they are drawn from the fact that the person against whom the right is claimed has for a length of time failed to interrupt or prevent an enjoyment by his neighbor which he might have interrupted had he so pleased. In *Chasemore v. Richards* (') the language held puts this beyond doubt. Wightman, J., said that no presumption could be raised from non-interruption unless the person against whom the right is claimed might have prevented it, and Lord Wensleydale, in addressing your Lordships, distinctly relied upon the fact that the defendant was not able to prevent the enjoyment which after a lapse of years had been claimed as a right against him. In the more modern case of *Sturges v. Bridgman* (") it was distinctly determined that no easement could be created by lapse of time unless the defendant might have interrupted it. "*Qui non prohibet quod prohibere potest assentire videtur*" is the legal maxim upon which, in my opinion, all the cases of easements of whatever kind acquired by length of time substantially rest.

The question therefore in each particular case must be, could the defendant have interrupted the enjoyment in question? Now if these words are taken literally all cases are alike, and the question is no question at all. For an action for the disturbance of the enjoyment claimed involves the possibility of its being disturbed, and the fact that the defendant has at last interrupted the plaintiff's enjoyment (say of support to his house) which constitutes his cause of action, is a very simple proof, except under special circumstances, that the enjoyment was capable of interruption at an earlier period. The defendant's power of interruption therefore, in my opinion, means something very different from the mere physical possibility of interrupting. It in-

(') 7 H. L. C., 349.

(") 11 Ch. D., 852.

volves knowledge that the necessity for support existed, and the possibility of withdrawing that support without the 806] expenditure of so much labor *or money, or the incurring of so much loss or damage, as a man could not reasonably be expected to incur.

There is direct authority for this proposition to be found in the case of *Webb v. Bird* (') in which Willes, J., states the principle which is to be extracted from the previous cases, in the following language:—"In general a man cannot establish a right by lapse of time and acquiescence against his neighbor, unless he shows that the party against whom the right is acquired might have brought an action, or done some act, to put a stop to the claim, *without an unreasonable waste of labor and expense.*" Nor is any other view of this matter, as it seems to me, consistent with the terms in which a right to be gained by prescription or lapse of time is defined. A claim by prescription to a right of this character is said only to arise when a right, or benefit, enjoyed over a length of time has been enjoyed "*nec vi,*" "*nec clam.*" What is the meaning and bearing of these qualifications? or what place could they have in such a definition, unless they point to the fact that the benefit claimed after a lapse of years as a right is one, the existence of which the person against whom it is claimed had the means of knowing, and the enjoyment of which he had the power to stop? And of what importance are these matters, except that they lay the foundation, where the right or benefit has not been interfered with, for presuming that he who might have interfered with them, has granted or consented that they should be undisturbed in future?

Continuous enjoyment without interruption is surely insisted upon as the basis of the right for some reason, and for what reason except that it is the evidence of assent? The physical power to interrupt, if accompanied, as I have above suggested, by a knowledge that the enjoyment of support existed, and by the means of exercising that power of interruption without extravagant and unreasonable loss or expense, may well give ground for an implied assent if it be not exercised for so long a period as twenty years. But if unaccompanied by these qualifications, the fact of non-interruption appears to lead to no conclusion whatever, and the restrictions insisted upon, that the enjoyment must be 807] "open" *and not sustained by "force," cease to have an intelligent place in the definition. In the present case it is obvious that a power to interrupt is one which al-

(') 10 C. B. (N.S.), 285; 13 C. B. (N.S.), 841

though it has existed, and been physically possible ever since the plaintiff's house was built, could only be exercised by measures which no man in his senses would take. It would indeed be an unreasonable state of the law which should enforce upon the defendant, if he wished to retain his original right to excavate his own soil at such time as his interests might require him to do so, that he should pull his own house down, and drag his neighbor's to the ground with it at a time when his interest did not require it, and when it could be nothing but a grievous loss and injury to all parties concerned.

For these reasons I am unable to support the conclusion that a right such as that here in question could be gained by the plaintiff by anything in the shape of prescription or lost grant; but if I am mistaken in this, I think it is clear that in the present case the question should have been submitted to the jury whether the enjoyment of the support to the house was an "open" enjoyment at all. The house was built in an exceptional manner, and that, which seen from the outside, would appear to be nothing more than an ordinary chimney stack carrying nothing but its own weight, was in truth a pier of brickwork, intended to carry, and in fact carrying, one end of an iron girder, upon which girder the whole upper floor of the house rested. If the plaintiff's right, therefore, was to be established by prescription, I think it inevitable that the matter should have been dealt with by the learned judge in the manner clearly described by Lindley, J., in his answer to your Lordships' fifth question. And I dare say it would have been so dealt with, if the learned judge had not considered the plaintiff's right to stand on a different ground altogether, and asserted it to be an absolute right acquired by twenty years' enjoyment, quite independent of grant, acquiescence, or consent. In so doing he relied, he said, upon the existing authorities. I will not recapitulate them or criticise them individually, as they have been carefully reviewed by others. They constitute the existing law on the subject; and I think the learned judge has drawn what is upon the whole the correct inference from them, though they are by no means uniform, and although, for the reasons I have given, *and for [808 those more fully expanded in the opinion of Fry, J., I am unable to find a satisfactory legal ground upon which these authorities may be justified. I feel the less difficulty in acquiescing in them, inasmuch as they affirm a right to exist after twenty years, which in my opinion should have been held to exist as soon as the plaintiff's house was built. The

learned judge's direction at the trial was therefore, in my opinion, correct, and this appeal should be dismissed with costs; and if I have ventured to question the legal principles upon which the authorities which guided him are founded, I have only done so lest this case should be thought an authority for the establishment of other rights more or less similar to the right here in question.

So far as my opinion goes this right, to the lateral support of the soil for an ancient house, stands upon the positive authority of a series of cases and a long acceptance in the courts of law, and the ratification of it by your Lordships ought not to be considered as the adoption of principles which might have a wide application in analogous cases.

LORD BLACKBURN: My Lords, the first of the defences raised by the pleadings is a denial that the plaintiffs were entitled to have their buildings supported by the land adjacent thereto. It is on this defence that the most difficult questions arise, and I shall consider it first.

It is, I think, conclusively settled by the decision in this House in *Backhouse v. Bonomi*(¹) that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

This right is, I think more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbor is 809] to use his land; *but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or rather perhaps cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed)

(¹) 9 H. L. C. 503.

not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on such terms as to prevent any such right arising (see *Rowbotham v. Wilson* (1); *Smith v. Darby* (2); *Eadon v. Jeffcock* (3); *Aspden v. Seddon* (4)). But the burthen both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Backhouse v. Bonomi* (5) also conclusively settles this, that though the right of support to a building is not of common right and must be acquired, yet, when it is acquired, the right of the owner of the building to support for it, is precisely the same as that of the owner of land to support for it. Both Lord Cranworth and Lord Wensleydale say that this right also is more properly to be called a right of property to be respected by the owner of the adjoining land than a negative easement or servitude *ne facias*. Lord Wensleydale could not mean to say that the right of support to a house was of common right, and so overrule several authorities, including *Gayford v. Nicholls* (6), where he himself had delivered judgment.

In the case now before your Lordships, nothing was proved which could have given rise to this right unless it arose from enjoyment in the manner and subject to the conditions and for the time required by law to give a title by prescription. And *inasmuch as it was clearly [810 proved that, though there had been more ancient buildings on the spot, they were removed, and buildings of a different structure and requiring a different degree of support were erected in their place only twenty-seven years before the excavations complained of, it seems to me clear that the buildings are not ancient buildings in the sense that they or similar buildings, for which in the course of repair they were substituted, had stood there from time beyond memory. The plaintiffs must (unless the construction of 2 & 3 Will. 4, c. 71, is such as to embrace such a case as this) rely on the comparatively modern doctrine, by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory.

I do not understand the late Lord Chief Justice Cockburn to doubt that such a right as that now in question might be acquired, according to English law, where the building had

(1) 8 H. L. C., 348.

(2) Law Rep., 7 Q. B., 716; 3 Eng. R., 281.

(3) Law Rep., 7 Ex., 379; 3 Eng. R., 458.

(4) Law Rep., 10 Ch., 394.

(5) 9 H. L. C., 503.

(6) 9 Ex., 702.

stood from time immemorial, by enjoyment open and peaceable from time immemorial. It was questioned on the argument at the bar of this House, whether a right of support for a building could be acquired by any length of enjoyment, even from time immemorial, and I shall consider that later. But the Lord Chief Justice, I think, denied that this right could be acquired by enjoyment for a less time than time immemorial. He said that such enjoyment might give rise to a presumption that there was originally a grant, or at least an assent in point of fact to the enjoyment, but said that when it was proved, or what comes to the same thing, admitted, that the assent of the defendants' predecessors was not asked for, or obtained by grant or in any other way, the presumption was at an end. This is expressed (') in terms confined to this particular right, but I think his position is general, and applies to every easement, unless it is claimed under Lord Tenterden's Act. This requires examination.

The English Common Law is stated by Lord Coke (*). He says, to make prescription, two things are incidents inseparable, possession or usage, and time. Possession must be long, continual, and peaceable. As to "long," Lord Coke [811] says: "It is the time *given by law, which in England is the time whereof there is no memory of man to the contrary." But though living memory might not be to the contrary, yet if written evidence showed that the possession had a beginning, it was defeated. By what Cockburn, C.J., seems to think a judicial usurpation of legislative power, the time of legal memory was fixed to be the same as the limitation of real actions by the Statute of Westminster (A.D. 1275), viz., the time of Richard I, A.D. 1189. This, when first introduced, gave a prescription of about eighty-six years, but being a fixed date it became longer and longer, and already when Littleton wrote, in the reign of Edward IV, he observes on the inconvenience felt, because the time of limitation of a writ of right is of so long time past.

This inconvenience must have been particularly felt with regard to any rights attached to buildings. For though a few buildings which existed in 1189 still exist, and there are some old cities and towns (not of very great extent) which then existed, and in which it is possible that the ancient buildings have been from time to time repaired without altering their structure, yet far the greater part of the buildings

(') 3 Q. B. D., at p. 118; 28 Eng. R., 110.

(*) Co. Lit., 113 b, 114 a.

in England stand on land which can be shown to have been first built upon at a much later date.

In *Bedle v. Beard*, A.D. 1806 (¹), it was held that, though it was proved that there was a time within legal memory when the right claimed had not existed, and consequently the right could not have its origin in prescription, long possession was a sufficient ground for presuming what was necessary to make that possession lawful; and consequently, in that case, where there had been possession for 303 years, for presuming a grant from the Crown, though none was shown. "This," says Lord Coke, "was resolved by Lord Ellesmere, with the principal judges, and on consideration of precedents." So that the doctrine was not then introduced for the first time. But the length of time necessary to give rise to such a prescription was left indefinite, and though I think no one, in that case, could have really believed that there actually had been a grant from the Crown which was lost, that is not said, and it may have been thought that long user was evidence by which the fact might be proved, but that it should not be found *unless be- [812] lieved. The modern doctrine that a jury ought to be directed that if they believed that there had been what was equivalent to adverse possession as of right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant, must certainly have been introduced after the passing of the Statute of Limitations, 21 Jac. 1, c. 16 (A.D. 1623), and as the earliest reported decision is that of *Lewis v. Price* in 1761, referred to in Sergeant Williams' note to *Yard v. Ford* (²), the doctrine is probably not much more than a century old. I quite agree with what is said by the late Chief Justice Cockburn (³), that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, "no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction." He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally a blunder, and inconvenient, *communis error*

(¹) 12 Co. Rep., 5.

(²) 2 Wms. Saund., 504, ed. 1871.

(³) 3 Q. B. D., at p. 105; 28 Eng. R., 98.

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facit jus. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the Legislature as it was at first to introduce that fiction.

It is difficult to reconcile all the *dicta* and decisions on the subject. There is language used in *Darwin v. Upton*, reported by Serjeant Williams in his note to *Yard v. Ford* ⁽¹⁾, as to the difference between an absolute bar and a presumptive bar which I have never been able to understand. I quite agree that where the evidence is such as to leave it a question whether the enjoyment has been such—open, peaceable, and continual—as to raise a presumption of the right, the jury must be asked to find as a fact whether the enjoyment was of [813] that kind; but the late Chief Justice seems ⁽²⁾ to *understand *Darwin v. Upton* ⁽³⁾ as amounting to this, that the jury should be told that if the enjoyment has been such as to raise a presumption of a right they may find a grant whether they believe in its existence or not; but that, if they choose to be scrupulous, they need not so find. I cannot believe that the judges meant that, and if they did, I think the subsequent cases are inconsistent with that ruling. I would more particularly rely on what is said by Bayley, J., in *Cross v. Lewis* ⁽⁴⁾. The judges never altered the form of pleading, and it was still necessary for a defendant setting up a right as a defence, to plead it with particularity: see *Hendy v. Stephenson* ⁽⁵⁾. In *Campbell v. Wilson* ⁽⁶⁾ the defendant pleaded, first, a way by prescription, which was traversed; and, secondly, that Bryan Grey was seised in fee of the *locus in quo*, and that Joseph Wilson (under whom the defendant made title by devise) was at the same time seised in fee of an adjoining moss dale, and that by deed, lost by time and accident, Bryan Grey granted a right of way over the *locus in quo* to Joseph Wilson and his heirs. The replication traversed the grant. At the trial in 1803, before Chambre, J., it appeared that in 1778, by an award made under an Inclosure Act, all ways not set out in the award were extinguished. And this way was not set out in the award. This put an end to the plea of prescription, and it would also have put an end to the second plea, unless the alleged grant by Bryan Grey was made subsequent to the award, that is, within twenty-five years next before the

⁽¹⁾ 2 Wms. Saund., 507, ed. 1871.

⁽²⁾ 2 B. & C., 686.

⁽³⁾ 3 Q. B. D., at p. 107; 28 Eng. R., 100.

⁽⁴⁾ 10 East, 55.

⁽⁵⁾ 2 Wms. Saund., 507, ed., 1871.

⁽⁶⁾ 3 East, 294.

trial, and, of course, within less than that time before the plea was pleaded, in which it was alleged that the deed was lost by time and accident. But evidence was given that there had been, for more than twenty years, an adverse enjoyment of the right of way. Now, if the issue joined was to be understood in its literal and natural sense, it could hardly have been suggested that this was evidence to justify the judge in leaving it to the jury whether, in fact, in the short interval between the making of the award and the commencement of the twenty years' enjoyment, not more than two or at most four years, there actually had been a grant since lost. But so to construe the issue would have made the question of *whether there was a right, to [814 depend on the accident of whether the right was set up by a plaintiff complaining of an obstruction to it, or a defendant justifying under it. Chambre, J., who was a very learned pleader, does not seem to have had the least doubt of the meaning of the issue. He never said one word to the jury as to the reality of the grant, but left it to them to presume it, if satisfied that the enjoyment was adverse, and had continued twenty years before the action. And this direction was approved of by Lord Ellenborough and the whole Court of King's Bench, the only question on which they seem to have had any difficulty being as to whether there was a proper direction given as to the nature of the enjoyment which would give rise to the presumption that the defendant acted by right. And in *Penwarden v. Ching* (¹), where issue was taken on a plea justifying a trespass in defence of an ancient window, and on the trial in 1829 it was proved before Tindal, C.J., that the window was first erected in 1807, that learned judge said that "the question is not whether the window is what is strictly called ancient, but whether it is such as the law, in indulgence to rights, has in modern times so called, and to which the defendant has a right, for this is the substance of the plea." The verdict was for the plaintiff, so that this ruling could not be reviewed, but it was the ruling of a judge who was a very learned pleader. In both those cases, and in many more, if the question had been whether there really in fact had been a grant or really in fact the window was ancient, there could have been no possible question. It was, no doubt, desirable that such artificial doctrines should be dispensed with. Lord Tenterden's Act (2 & 3 Will. 4, c. 71), so far as it went, made that a direct bar which was before only a bar by the intervention of a jury and the use of an artificial fiction of law.

(¹) Mood. & M., 400.

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But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done: see *Aynsley v. Glover* (*). I think the law, as far as regards this subject, is the same as it was before that act was passed. Neither can I agree with what seems thrown out by Lush, J., rather as a makeweight than as a substantial ground of decision, that the more recent Limitation Act 815] *(3 & 4, Will. 4, c. 27) which put an end to the doctrine of adverse possession, has made any difference in the law. This view of the matter renders it unnecessary to decide anything as to the construction of Lord Tenterden's Act (2 & 3 Will. 4, c. 71), and I wish to say nothing that may prejudice the decision of that question if hereafter it becomes material.

I scarcely think that, if this had been the only point argued at your Lordships' bar on the first occasion, it would have been thought of sufficient difficulty to ask the opinions of the learned judges. But it is satisfactory to find that they all agree that a building, which has *de facto* enjoyed (under the circumstances and conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had.

I am glad that the recent alterations in the law have obviated the necessity of putting such very artificial constructions on issues as I have mentioned. But I am not able to agree with Bowen, J., in thinking that the alterations in the modes of procedure and the fusion of law and equity have made any alteration in the substance of the law. I quite agree with him in thinking that circumstances might, and often did, give rise to an equity to protect a house which would not have given rise to a legal claim to maintain an action at law. But those circumstances must always have existed in fact, and generally there must have been notice of them. I cannot think the alterations in procedure have altered the law.

On the first argument at the bar of this House in November, 1879, when the Lords present were the then Lord Chancellor (Earl Cairns), Lord Penzance, and myself, a very able argument was addressed to this House by the then Attorney-General (*) and the now Solicitor-General (*), and at the close of it the Lord Chancellor summarized the argument (I took a note of it at the time), and asked if this was a correct statement of their proposition;—"In order to gain for the

(*) Law Rep., 10 Ch., 283; 12 Eng. R., 726.

(*) Sir John Holker.

(*) Sir F. Herschell.

owner of land, by enjoyment, a title to some advantage from or upon his neighbor's adjacent close, greater than would naturally belong to him, the *advantage must be one [816 the enjoyment of which is or ought to be known to the neighbor, and could, without destruction or serious injury to his own close, be interrupted by him." And this was accepted by the Attorney-General as truly representing the argument. As 2 & 3 Wm. 4, c. 71, was couched in terms which, as it has been held, prevented its applying to this case, it might be necessary in considering this proposition, to decide questions of great importance, which had never yet been finally decided; and, therefore, it was deemed advisable to have the assistance of the learned judges, and a further argument was ordered.

I do not think anything was said at the second argument that was not involved in the summary of the first argument which I have above quoted. It was admitted that if the proposition was correct, no lapse of time, not even from time immemorial, could give a right of support to a building, such as to oblige the owners of adjoining land to respect it; and that the same would have been before 2 & 3 Will. 4, c. 71, and still was in cases not within its provisions, the law as to the acquisition by enjoyment of the right to require the neighbors to respect the access of light and air to a window, unless it made a difference that the enjoyment in this latter case could be easily interrupted. And reference was made to cases which were said to be analogous, such as that of keeping land undrained, so as to act as a reservoir for springs, *Chasemore v. Richards* ('); or that of claiming to have uninterrupted the access for the wind to a windmill, *Webb v. Bird* ('); and it was said that the principle on which those cases were decided was one which showed that there was no right of support acquired by the common law prescription for a building, though it had stood for time immemorial, and if that was so, there could be none by the prescription for a shorter period created by the modern decisions; for I agree with Bramwell, L.J., where, in *Bryant v. Lefever* ('), he says that what he calls the expedient, introduced by these decisions, is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from *time immemorial, and is therefore only [817 applicable where the right claimed is such as, if immemorial, might have been the subject of prescription.

(') 7 H. L. C., 349.

(') 13 C. B. (N.S.), 841; 31 L. J. (C.P.), 835.

(') 4 C. P. D., 175.

My Lords, during the very considerable interval that elapsed between the first argument in November, 1879, and the time when the opinions of the learned judges were delivered, the 15th of March, 1881, I have at intervals bestowed consideration on this proposition, and though I refrained from finally coming to a decision till I had the advantage of considering their opinions, I was strongly impressed with the conviction that such a right as is here claimed, was, according to the established law of England, one which might be acquired by prescription. And I find that all the judges agree in that result, though not entirely for the same reasons, and I am not sure that any of them would have quite assented to the train of reasoning which has led me to that same result. On a minor point—whether there should be a new trial because the judge at the trial left no question to the jury when, as it was said, there was or might have been evidence produced which would raise a question of fact which might have been a defence,—the learned judges are divided in opinion; Lindley, Lopes, and Bowen, JJ., agreeing with the majority of the Court of Appeal that there should be a new trial; Pollock, B., and Field, Manisty, and Fry, JJ., thinking that there should not. It is not necessary to choose between the divers reasons which led them to the same result on the first point. It may be necessary to do so on this minor point, where their reasons led to different results. I have come to the conclusion that there should not be a new trial. I will state the reasoning which has led me to these conclusions.

My Lords, I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbor's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbor. Nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a [818] ground for finding that there was *an actual assent, but that is, in many if not in all cases, a fiction; there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the

prescribed period, whether there has been laches or not ; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are "Ad ea quæ frequentius accidunt jura adaptantur." This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive.

Prescription is not one of those laws which are derived from natural justice. Lord Stair, in his Institutions, treating of the law of Scotland, in the old customs of which country he tells us prescription had no place (book 2, tit. 12, s. 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."

It was called by the old Roman lawyers *Usucapio*, which is defined (Dig., lib. 41, tit. 3, De usurpationibus et usucapionibus, art 3,) to be "adjectio domini per continuationem possessionis temporis lege definiti." And in the same book and title, art. 1, the reason is given,—"Bono publico usucapio introducta est ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium." This is precisely the object with which modern Statutes of Limitations are established, and it would be baffled if there was to be a further inquiry as to whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for [819 any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern Statutes of Limitations, but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times. The minor question whether there should be a new trial, in my mind, depends on the question what positive laws have been adopted by the English courts. To return to the Roman law, *Usucapio*, it will be noticed, was confined to the *dominium*, nearly equivalent to the modern phrase of the legal estate.

It was enunciated in the laws of the Twelve Tables, in terms brief, to the extent of being obscure, and simple to the extent of being rude—"Usus auctoritas fundi biennium, cæterarum omnium annuus est usus." This for centuries, down to the time of Justinian, continued to be the law, as far as regarded the *dominium*, within the old territory of the republic, but side by side with it, the Prætors introduced, by their edicts, a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked at the Digest will complain of this Prætorian law as brief; nor will any one who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Prætors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory:—"Prætor ait, Quod vi aut clam factum est qua de re agitur id cum experiendi potestas est, restituas" (Dig., lib. 43, tit. 24, art. 1). This relieved the true owner from the *usucapio* which transferred the *dominium* in consequence of a possession of two years if the possession was not peaceable, or not open.

"Ait Prætor, Quod precario ab illo habes aut dolo malo fecisti ut desineres habere qua de re agitur, id illi restituas" (Dig., lib. 43, tit. 23, art. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, "Uti possidetis" (Dig., lib. 43, tit. 17), the Prætor forbade any one to disturb, by force, any possession which had been obtained 820] "nec vi, nec clam, nec precario." And on the *basis principally, but not exclusively, of those three edicts, the Prætors established what was called the "*præscriptio longi temporis*." I will read what Pothier says in his treatise "De la Prescription, Article Préliminaire, Article 3." I quote from the eighth volume of Pothier's works by M. Dupin, p. 390: "Suivant ce droit préteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient res mancipi pendant le temps de dix ans inter præsentes, et de vingt ans inter absentes, acquérait après l'accomplissement du temps de sa possession, non le domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui

qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription." Thus the Prætors, whilst professing to leave the Law of the Tables in force, at least within the old territory of the Republic, practically deprived it of all force. Justinian by two laws (Codex, lib. 7, tit. 25), "De nudo jure Quiritium tollendo," and tit. 31, "De usucapione transformanda," changed all this. The two laws are couched in terms that show that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. Justinian, says Pothier, by these enactments has changed the prescription of ten and twenty years into a true "usucapio," for they have caused the "dominium" to pass to the possessor of the heritage, or the incorporeal right of which he has had during that time a possession or quasi-possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which France was before the revolution divided, many of which were governed by their own customs, the laws of prescription varied. Domat in his treatise on the Civil Law (I quote from the translation by Doctor Strahan), book 3, title 7, s. 4, says: "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages *their inconveniences. And it sufficeth to remark [821] here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views; one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired." Those who framed the Code Napoléon had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, Arts. 688, 689). Those divisions, and the definitions, were, as far as I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law

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authority before Gale on Easements in 1839. On this division their legislation was founded. The first *Projet* of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The Code Civil as it was finally adopted by Article 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes not apparent and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of *Lex Pandectæ Françoises* (Paris, 1804), on whose authority I state this, say ('), that this great change from the principle of the *Projet* was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state more openly than I should have expected in a book published in Paris in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm Lord Stair's position that the laws of different countries relating to prescription are positive laws differing 822] in matter, *manner, and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by Domat in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.

It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes v. Keme*, A.D. 1613⁽¹⁾, proves the great antiquity of this law. But as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case* ⁽²⁾. I will read the whole of it, for though the point actually decided was only that a window first erected in the reign of Queen Mary,

(1) Vol. v, p. 488.

(2) *Yelv.*, 215.

(3) 1 Leon., 168; *Michaelmas*, 29 & 30 Eliz., A.D. 1587.

that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of the court on points not actually decided is important. "Bowry brought an action upon the case against Pope, and declared that in the time of Edward VI, the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The which Mason leased one of the said houses to one A., and covenanted by the indenture of lease with the said A., that it should be lawful for the said A., his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen Mary a window was made accordingly where no window was there before. And afterwards A. assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building *super solum ipsius Pope ex opposito* the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty, and it was found for the plaintiff. And it was moved for the defendant in arrest of judgment that *here upon the declaration appeareth no cause of [823 action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected *scilicet* in the time of Queen Mary. The stopping of which by any act upon my own land was held lawful and justifiable by the whole court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted as above said, then Pope could not have justified the nuisance, which was granted by the whole court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on Littledale, J., in *Moore v. Rawson* (¹), and which leads Fry, J., in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither Mason nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In Trinity, 29 Eliz., about nine months later, the Queen's Bench, in *Bland v. Moseley*, decided the second point resolved by the Common Pleas the same way, and they also

(¹) 3 B. & C., 332.

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seem to have agreed with the third resolution. The case is cited in *Aldred's Case*⁽¹⁾. The reasons as reported by Lord Coke, are: "It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and Wray, C.J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et rescitur aura æthereæ*, and the said words *horrida tenebritate* are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action [824] lies for stopping thereof, *and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos quæ prospiciat agros*. But the law does not give an action for such things of delight."

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbor's lights by boardings, until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General v. Doughty*⁽²⁾, where he observes that if that was the case there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb v. Bird*⁽³⁾ and *Chasemore v. Richards*⁽⁴⁾ are to be supported. The rights there claimed were analogous to prospect in this,

(1) 9 Co. Rep., 58 b.

(2) 2 Ves. Sen., 453.

(3) 10 C. B. (N.S.) 268; 13 C. B.

(N.S.), 841.

(4) 7 H. L. C., 349.

that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction the law has always, since *Bland v. Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. Pigott, decided in 1625, is reported in Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; and W.* Jones, 145. It seems to have excited a [825 good deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury v. Pigott* was, that in a conveyance there was (though nothing was said) an implied grant that neither the conveyor nor any one who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water; a principle which, in the case of a house, would certainly include support.

In *Palmer v. Fleshees* (¹) the first point ruled by Twysden and Wyndham, JJ., was, "if I, being seised of land, lease forty feet to A., to erect a house upon it, and other forty feet to B., to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury v. Pigott's Case* (²), for each can make the best advantage of his own, but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging." The reference to *Shury v. Pigott* (²) shows that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in 1 Levinz, 122. "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder" (vendor) "can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by Twysden and Wyndham, JJ., Hyde, being absent and Kelynge doubting. For the lights are a necessary and essential part of the house. And Kelynge said, Suppose the land had been sold first and the house after, the vendee of the land might stop the lights. Twysden, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns. But all agreed that a stranger hav-

(¹) 1 Sid., 167.

strode, 339; Noy, 84; Latch, 153; W.

(²) Palmer, 444; Popham, 166; 3 Bul- Jones, 145.

ing lands adjoining to a messuage newly erected, may stop 826] the lights, for the building of any man on his *lands cannot hinder his neighbor from doing what he will with his own lands ; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription." I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with ; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house ; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the Digest, lib. xli, tit. 3, art. 1, quoted before, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by showing that it was not originally given to him. And I think that the decisions ending in *Backhouse v. Bonomi* (¹), which is put in a very clear light by Manisty, J., in his opinion, decide that he should not be deprived of it. Fry, J., thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Backhouse v. Bonomi* (¹) the workings which did the mischief were at a considerable distance from the plaintiff's 827] house, and *would not have done any harm if the intervening minerals had not been previously removed by the defendant. Very different considerations may arise where the intervening minerals have been removed by the

(¹) 9 H. L. C., 503.

plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention the *Corporation of Birmingham v. Allen* (*), as Lush, J., did below, to show that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon v. Vintners' Company* (†) where it was said that, at all events, the rights, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house; and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by Lush, J. (*), one very little onerous to the neighbors, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the *enjoyment was in the beginning wrongful, and the [828 owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption

(*) 6 Ch. D., 284; 22 Eng. R., 811.

(†) 4 H. & N., 585.

(‡) 3 Q. B. D., 89; 28 Eng. R., 84.

that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favor of quieting title; where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned judge could, at the trial, on this evidence have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighboring soil. The judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper story, and I cannot see what else could have been asked.

829] *The second defence is a question of pure law. Ever since *Quarman v. Burnett* ⁽¹⁾ it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve

(1) 6 M. & W., 499.

himself from liability to those injured by the failure to perform it: *Hole v. Sittingbourne Railway Co.* (1); *Pickard v. Smith* (2); *Tarry v. Ashton* (3).

I do not think either side disputed these principles, nor that, in *Bower v. Peate* (4), the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler v. Hunter* (5) was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that the defendants are right in saying that it was such as to make the case not distinguishable from *Bower v. Peate* (4), I think that the reasoning in *Bower v. Peate* (4) is the more satisfactory of the two.

My Lords, the Court of Appeal in this case ordered that unless the defendants elected within fourteen days to take a new trial, judgment should be entered for the plaintiffs. If your Lordships take the view of the case which I have stated, and which is that of Lush, J., Pollock, B., Field, Manisty, and Fry, JJ., it will be sufficient to dismiss the appeal, for the time for the election to take a new trial is long passed, and it need not be noticed.

*LORD WATSON: My Lords, it is unnecessary for [830 me to make any lengthened observations in this case. Seeing that my opinion is in substantial concurrence with what has already been said, few words of explanation will suffice to express my views.

I am of opinion that a right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. That proposition appears to me to have been recognized as the law of England in a long series of weighty, if not conclusive, judicial opinions, and to have been tacitly accepted by this House in the case of *Backhouse v. Bonomi* (6).

The obligation which the creation of such a right by user imposes upon the owner of the adjacent soil, is to give continued support to the building. Consistently with that obligation he can make any lawful use of his land which he thinks proper. He may dig into, or even remove, the strata from which the building derives support, provided he gives

(1) 6 H. & N., 488.

(2) 10 C. B. (N.S.), 473.

(3) 1 Q. B. D., 314; 16 Eng. R., 367.

(4) 1 Q. B. D., 321; 16 Eng. R., 374.

(5) 7 H. & N., 826.

(6) 9 H. L. C. 503.

efficient substituted support, by means of a retaining wall or other device. The proprietor of the building cannot, according to the decision in *Backhouse v. Bonomi* ⁽¹⁾, complain that his right has been infringed, unless and until the stability of the edifice has been affected by the withdrawal of its lateral support. I agree with the noble and learned Lord on the woolsack in holding the right in question to be a proper easement, and in the results which follow from taking that view of its character. In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest in land which belongs to another, whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement. But a right constituted in favor of estate A. and its owners, in or over the adjoining lands of B., is in my opinion of the nature of an easement, and that whether such right is one of the natural incidents of property, or has its origin in grant or prescription.

831] *I am unable to regard the right of support to a building, whether lateral or vertical, as a negative easement, and I concur in the observations which have been made upon that point by the noble and learned Lord on the woolsack, as well as by Lindley and Bowen, JJ. It appears to me to be as truly a positive easement, as the well known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement. The distinction between positive and negative easements may not be of vital importance in the present case; but in dealing with this point I am probably influenced by the consideration that a decision to the effect that an easement of lateral support to buildings is negative, would form an unsatisfactory precedent in another part of the country where positive servitudes alone are capable of being acquired by prescriptive enjoyment.

It appears to me, for reasons which have already been fully explained by your Lordships, that the respondents have adduced proof of possession for the prescriptive period sufficient to establish their right to support from the adjacent soil, for the new or altered building which has stood for the last twenty-seven years. I do not think that any question of fact is disclosed by the pleadings or by the evidence in the case, which ought to have been, but was not, submitted to the jury.

Upon the point of law which was not remitted to the learned judges who have favored the House with their opinions upon the main questions arising in this appeal, I agree

(1) 9 H. L. C., 503.

with your Lordships. The operations of the Commissioners were obviously attended with danger to the building in question; but these appellants seek to shelter themselves from responsibility by proving that they took their contractor bound to adopt all measures necessary for ensuring the safety of the building. When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbor's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and [832 is therefore liable, as well as the contractor, to repair any damage which may be done.

I therefore concur in the judgment which has been proposed by your Lordships.

Judgment affirmed, and the appeals dismissed with costs.

Lords' Journals, 14th June, 1881.

Solicitors for appellant Dalton: *Prior, Bigg, Church & Adams.*

Solicitors for appellants the Commissioners: *Hare & Fell*, for Solicitor to the Treasury.

Solicitors for respondents: *Shum, Crossman, Crossman & Prichard*, for Stanton & Atkinson, Newcastle-on-Tyne.

See ante, p. 538 note.

In the case of an aqueduct, as in that of a way, the owner of the easement may peaceably pursue his right against any obstructions which the landowner throws in the way of its enjoyment.

If blasting in a quarry undermine an aqueduct, its owner may adopt new means of supporting it in its place, and if a broader base for the new support than the width of the original location of the aqueduct had been rendered necessary by the blasting, it is not trespass on the owner of the soil to use his land for that purpose.

An aqueduct has the right of support in the land, and if blasting under it within the limits of its location by the landowner deprive it of its former support, the right still remains, and its enjoyment may be reclaimed with the incidents which necessarily went

along with it. The same is true of a change of the course of the aqueduct, rendered necessary by the act of the owner of the servient estate.

In an action by the owner of an aqueduct against the owner of the land, or one acting under his license, for damages resulting from quarrying beneath the aqueduct, the verdict must give complete satisfaction for the whole injury. If the jury by their verdict allow only the cost of the structure less than permanent, they are to add a fund, the interest of which would be sufficient to keep the structure in permanent repair. But the defendant in such a case is not to be subjected to an indefinite liability for all future acts of the quarry owners doing damage to an aqueduct legally located and properly built.

It is not the negligence of the workers in the quarry which would render

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them liable in such a case, but the effect of their acts, negligent or not, to disturb the plaintiffs in the enjoyment of a dominant right.

The defendant is not liable in such a

case for injuries occasioned by the acts of his grantees, though holding the quarry under his warranty deed: *Rockland Water Co. v. Tillson*, 75 Maine, 170.

[6 Appeal Cases, 838.]

H.L. (Sc.), July 12, 1881.

[HOUSE OF LORDS.]

833] *PATERSON and Others, *Appellants*; PROVOST, &c., OF ST. ANDREWS, and JAMES BAIN and Others, *Respondents*.

Power of Magistrates in the exercise of Administration to make Road over Land held for Public Recreation—Constitution of new Rights and Burdens—Alienation of Solum.

Magistrates for a burgh held the links from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf and for the recreation and amusement of the inhabitants. They had from time to time exercised powers of administration and management over the links, such as the letting of the pasturage, the regulation of bleaching clothes on the links, the construction of a sloping walk, and the levelling and filling up other portions of the ground. The magistrates proposed to make a macadamised road along the outside boundary of the links, where that boundary adjoins certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links.

P., an inhabitant of the burgh and member of the principal golfing club there, and others, the appellants, sought by note of suspension and interdict to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:

Held, substantially affirming the decision of the judges of the court below, but altering their interlocutor, that the evidence proved that the proposed road would have no substantial interference with the obligation of golfing, &c., and that the road might be reconciled with its due observance; but that it was inconsistent with that obligation for the magistrates to alienate any part of the *solum* of the ground in question, or to abdicate their existing powers of administration either by granting private easements to particular individuals, or, having made the road, to create a public easement by dedicating it to the public.

Held, also, that the respondents were not entitled to their costs in the appeal on the grounds that the alteration made in the interlocutor of the court below was wanted to give complete security to the interests represented by the appellants; and because the attitude of both sets of respondents before action brought was such as to justify the institution of some action for the purpose of obtaining the declarations now obtained.

[6 Appeal Cases, 855.]

H.L. (Sc.), August 3, 1881.

[HOUSE OF LORDS.]

*FRASER OR ROBINSON, *Appellant*; MURDOCH, *Re-* [855]
spondent (').

Trust—Legacies—Severance of Funds for Investment for Behoof of Distinct Parties—Indemnity of Trustees for Liability incurred.

A testatrix directed her trustees to pay the interest or annual rent of £2,000 to Mrs. A. during her life and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children.

The trustees were empowered by the deed to realize, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained;" with power also "to lend or place out on such securities, heritable or movable, as they shall consider advantageous, the foresaid legacies of £2,000 and £2,000 respectively, the securities to be conceived in favor of my trustees, and that for the purposes of this trust and no otherwise."

The testatrix at her death held £350 stock of an unlimited bank. The trustees, at the desire of Mrs. A. and without consulting Mrs. B., set £200 of this stock aside as part of the fund appropriated to Mrs. A., and realized the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of £2,000, and that they had paid the residue, received their discharge from Mrs. A. and Mrs. B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees.

The bank became insolvent, and calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:

Held, reversing the decision of the court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family.

Ex parte Garland (10 Ves. Jun., 110) followed.

APPEAL from the Second Division of the Court of Session, Scotland.

Survived by one son, James Fraser Robb, and two daughters, Mrs. Sinclair and Mrs. Robinson (the appellant), both widows with *families, Mrs. Elizabeth Fraser died on [856 the 11th of January, 1876, leaving a trust disposition and settlement, dated the 7th of October, 1870. Of the trustees mentioned in the trust deed the son, James Fraser Robb, and the respondent, Mr. William Murdoch, only accepted the trust.

By the trust disposition the testatrix granted to her trustees in trust all her estate, except the lands of Thorax,

(') Reversing Court Sess. Cas., 4th Series, vol. 7, p. 694.

which were by a previous deed settled on her son, for the following purposes:

First: To pay all her just and lawful debts and expenses.

Secondly: To make payment to Mrs. Sinclair "of the interest or annual rent of £2,000 sterling payable at the term of Whitsunday yearly, beginning the first payment thereof at the first term of Whitsunday which shall happen after the expiry of one year from the date of my decease, and so forth yearly during the life of the said" Mrs. Sinclair. And after her decease "my trustees shall be bound and obliged to make payment to her child or children of the foresaid sum of £2,000."

Thirdly: A precisely similar trust as to £2,000 in favor of Mrs. Robinson, the appellant, and her children in fee.

Fourthly: Four legacies of £5 to the four trustees named.

And lastly:

"That my trustees shall, after payment of my debts, death-bed and funeral expenses, and the expenses of this trust, and making provision for payment of the legacies above mentioned, divide the free residue and remainder of my said heritable and movable means and estate (excepting always the said town and lands of Thorax and others) equally between and among the said James Fraser Robb, Margaret Fraser or Sinclair, and Elizabeth Fraser or Robinson, share and share alike; with full power to my trustees to enter into possession of the said trust estate and effects, to call and sue for, uplift and receive the rents, mails, and duties, interests and annual profits of the same, and to grant discharges therefor, which shall be as valid and effectual to the receivers as if granted by myself; as also to sell and dispose of all or any part of the said trust estate and effects, and that either by public roup or private bargain, as my trustees shall consider most proper; and to execute all and whatever deed or deeds, containing all necessary clauses for rendering the said sale or sales effectual, in the same manner and as amply as I could have done myself; with power also to my trustees to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained: With power also to my trustees to lend or place out on such security or securities, heritable or movable, as they shall consider advantageous, the foresaid legacies of £2,000 and £2,000 respectively, the said security or securities to be conceived in favor of my trustees, and

that *for the purposes of this trust and no otherwise ; [857 as also to vary such security or securities in or upon which they shall have lent or placed out the moneys coming into their hands in virtue of the present trust for other security or securities of the like nature, when and so often as it shall seem to them expedient : With power also to my trustees to appoint either one of their own number or any other person, with or without caution, to be their factor, agent, or cashier, for uplifting, discharging, and conveying the funds of the trust hereby created and the securities held by them for the same, and for applying the same for the purposes of the trust, and to give a reasonable allowance to such factor, agent, or cashier for his trouble : And further, with power to my trustees hereby appointed or to be appointed in pursuance hereof from time to time to nominate and appoint any person or persons to be a trustee or trustees along with them, or in place of any trustee or trustees who shall die or desire to be discharged, or refuse, decline, or become incapable to act in this trust ; and when and so often as any new trustee or trustees shall be so nominated and appointed, all the trust estate and effects, heritable and movable, real and personal, shall forthwith be disposed and assigned in such form as the same shall be vested in such new trustee or trustees jointly with the continuing trustee or trustees, or solely with the new trustee or trustees in case of there being no continuing trustee, and that for the purposes of this trust and no otherwise : Declaring always that my trustees shall not be liable for omissions or neglect of management, nor *singuli in solidum*, but each one for his own acts, receipts, or intromissions only, nor shall they or any of them be liable, answerable, or accountable for any banker, factor, or other person, with whom or in whose hands any of the trust funds may come to be deposited in the execution hereof, nor for the insufficiency or deficiency of any funds or securities in or upon which any of the trust funds may be invested in pursuance of and conformity to this settlement, or for any other misfortune, loss, or damage, which may happen in the execution of this trust or otherwise in relation hereto unless the same shall happen by or through their own wilful defaults respectively.”

The trust estate which fell under the trustees' management was £5,333, composed chiefly of railway preference stocks, but it included £850 Consolidated Stock of the City of Glasgow Bank, an unlimited company. The trustees having cleared off the liabilities of the trust and paid the smaller legacies, proceeded to make arrangements for setting aside

funds to meet the investments of the two legacies of £2,000. They did this by partly retaining existing investments and partly by purchasing new ones. As to the stock of the City of Glasgow Bank some correspondence passed between James Fraser Robb, one of the trustees, and his sister, Mrs. Sinclair, and the other trustee, Mr. Murdoch. In a letter dated the 28th of November, 1876, Mr. Murdoch's firm wrote as follows to Mrs. Sinclair :

Dear Mrs. Sinclair,—We had a letter a few days ago from Mr. Fraser Robb, in which he stated that he had written to you to see whether you would care to take £1,000 worth of the City of Glasgow Bank Stock as part of the money to be 858] *invested for your behoof by the trustees under Mrs. Fraser's will. We are anxious to have the matter of the investments concluded prior to Mr. Fraser Robb's leaving the country, as he proposes to do next month, and shall be glad to learn your views on that subject. We may mention that our brokers recommended that this stock should be realized, and our own view is that bank stock is not a suitable class of stock for trustees to hold.

To this Mrs. Sinclair replied on the 30th of November, 1876:

Dear Mr. Murdoch,—I am in receipt of yours of the 28th, and beg to say in reply that I would be unwilling to risk so large a sum as £1,000 in the purchase of stock of the City of Glasgow Bank ; but, with the consent of the trustees, I would willingly invest £500, and that on my own responsibility. . . .

Accordingly the trustees retained £200 of the Glasgow Bank Stock, and realized the remaining £650. In their communications with the appellant, who resided in Australia, they do not seem to have informed her that they intended to retain any portion of this stock until she received the discharge mentioned below.

The trustees having arranged for the investments towards the two specific legacies of £2,000, proceeded to deal with the residue of the estate. The share of residue falling to the appellant was £382 14s. 1d.; of this the trustees retained £124 15s. to be invested on her account in order to meet any depreciation which might occur when the investments were realized. They retained a similar sum for the like purpose out of Mrs. Sinclair's share of residue. The trustees next prepared a discharge granted to the trustees by Mrs. Fraser's three children. This discharge, dated the 22d of March and 31st of May, 1877, after narrating the trust disposition, the assumption of new trustees, proceeded as follows:

And, further, considering that the said James Fraser Robb, William Murdoch, Robert Fraser Robb Sinclair, and Andrew Macpherson, trustees, original and assumed as hereinbefore mentioned, having realized so far as necessary the means and estate of the said Mrs. Elizabeth Robb or Fraser, paid the debts, death-bed and funeral expenses, and

the expense of executing the said trust, and the legacies of £5 to each of the said James Fraser Robb, James Morison, and William Murdoch, have invested the foresaid sum of £2,000 mentioned in the second purpose of the said trust disposition and deed of settlement (under deduction of the sum of £20, being the legacy duty thereon), in the following stocks: viz., £200 of the City of Glasgow Bank Stock, £1,025 Consolidated Preference Stock No. 2 of the Caledonian Railway Company, £300 Guaranteed Stock of the said Caledonian Railway Company, £100 Monkland Preference Stock (Ordinary) of the North British Railway Company, and £60 2s. 6d. Consolidated Preference Stock No. 1 of the said North British Railway Company, and have invested the *foresaid sum of £2,000 mentioned in the third pur- [859
pose of the said trust disposition and deed of settlement (under deduction of the sum of £20 as aforesaid), in the following stocks:—viz., £1,225 Consolidated Preference Stock No. 2 of the said Caledonian Railway Company, £300 Guaranteed Stock of the said Caledonian Railway Company, £100 Monkland Preference Stock (Ordinary) of the said North British Railway Company, and £315 17s. 6d. Consolidated Preference Stock No. 1 of the said North British Railway Company; and that the said trustees have exhibited to us accounts of their intromissions with the estate and effects of the said deceased Mrs. Elizabeth Robb or Fraser, showing that after payment of the said debts, expenses, and legacies, and providing for the investment of the said sums of £2,000 (under deduction as aforesaid), and the interest or annual rent due at the term of Whitsunday, 1877, to the said Mrs. Margaret Fraser or Sinclair, and Mrs. Elizabeth Fraser or Robinson, there remains in the hands of the said trustees a free residue of £1,148 2s. 3d., giving to each of us the said residuary legatees the sum of £382 14s. 1d.: And further, considering that it has been agreed between us, the said Mrs. Margaret Fraser or Sinclair, and Mrs. Elizabeth Fraser or Robinson, and the said trustees, that the sum of £124 15s. should be retained by the said trustees from the residue falling to each of us as aforesaid, to meet any depreciation that may arise on the stocks in which the said sums of £2,000 (under deduction as aforesaid) have been invested as hereinbefore mentioned, and as a security to the said trustees against any loss that might thereby be incurred by them; and that the said sums of £124 15s., retained as aforesaid, should be invested in the names of the said trustees, and the interest or dividends accruing thereon paid to us, along with the interest or dividends on the foresaid

sums of £2,000 (under deduction as aforesaid); that the said trustees should be bound to account to us, our executors or representatives, for the said sums so retained. . . .

The deed continued, considering that in terms of the aforesaid agreement, the trustees had in each case invested the said sum of £124 15s. 1d. in that amount of Consolidated Preference Stock No. 1 of the said North British Railway, of which investment Mrs. Sinclair and Mrs. Robinson approved: and that the balance of residue had been paid to them, they thereby acknowledged the receipt of that sum and discharged the trustees; and acquit and simpliciter discharge the said trustees acting under the said trust disposition of the whole actings, transactions, intromissions, and management had by them with the means and estate of the said Mrs. Elizabeth Robb or Fraser.

The trustees half-yearly rendered to the appellant statements and accounts of the investments which were held by them for her behoof and of interest falling due thereon. Similar statements and accounts, including the City of Glasgow Bank stock, were rendered to Mrs. Sinclair, to whom 860] the dividends on that stock were *regularly paid. All the investments stood in the names of Mrs. Fraser's trustees.

In October, 1878, the City of Glasgow Bank became insolvent; and in the liquidation which followed James Fraser Robb and the respondent William Murdoch were placed on the list of contributories in respect of the £200 stock which stood in their names as Mrs. Fraser's trustees, and calls amounting in the aggregate to £5,500 were made upon them. The trustees proposed to pay the calls out of the investments appropriated to the appellant, Mrs. Robinson, as well as out of those allotted to Mrs. Sinclair. The appellant, to prevent the trustees so applying stocks appropriated to her legacy, raised this action by a note of suspension and interdict.

The action, which was directed against Mrs. Fraser's trustees, was resisted only by the nominal respondent, William Murdoch, who had entered into a compromise with the liquidators, and had assigned to them all right of relief competent to him against the trust estate.

No proof was led, but the parties by a joint minute agreed, *inter alia*, that the court should be entitled to draw all inference both of fact and law from the terms and contents of the letters and documents produced which were held as genuine.

The pleas in law of the appellant were *inter alia*:

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(2.) Two separate and distinct trust estates having been created as applicable to the complainer and Mrs. Sinclair respectively, the respondents are not entitled to burden the complainer's estate with losses sustained through the investments made for Mrs. Sinclair's trust estate and behoof. (3.) In any view, the trustees having made separate and distinct investments, the one set applicable to Mrs. Sinclair, and the other to the complainer, there was thereby, and by the correspondence which preceded and the actings of parties which followed, an arrangement constituted whereby the risk of the investments made on behalf of Mrs. Sinclair was left with her, and her share of the trust funds in the trustees' hands, and in no respect with the complainer or her investments. (4.) The respondents are barred, by the arrangements entered with Mrs. Sinclair condescended on, from claiming relief against the complainer or the investments made for her behoof.

The material pleas in law for the respondent were :

(2.) The trustees having acted within their powers in continuing to hold the bank stock, are entitled to be indemnified out of the trust estate in their hands for any loss incurred or to be incurred by them in consequence of holding the said *stock. (3.) The investments of the [861] trust funds having all along stood in the names of the trustees as such, and the trust being one and indivisible, the trustees' lien or right of indemnity subsists, and extends over the whole trust estate. (4.) The trustees not having by their actings, or by acceptance of the discharge founded on, or in any other way, renounced or restricted their said right of indemnity as against the complainer, the *interim* interdict should be recalled, and the reasons of suspension repelled, with expenses.

The Lord Ordinary⁽¹⁾ on the 6th of January, 1880, gave judgment in favor of the appellant, and granted the interdict as prayed for; but the Second Division, on the 10th of March, 1880, consisting of three judges, recalled (Lord Gifford dissenting) the Lord Ordinary's interlocutor, and repelled the reasons of suspension, and refused the interdict⁽²⁾.

June 21, 23. *The Solicitor-General for Scotland* (Mr. J. B. Balfour, Q.C.), and Mr. *Moncreiff*, maintained for the appellant, that under the terms of the trust deed it was *ultra vires* of the trustees to retain bank stock as an investment of the specific legacies.

(1) Lord Rutherford Clark.

(2) Court Sess. Cas., 4th series, vol. vii, p. 694.

It was not in the exercise of the powers conferred by the trust deed, but under a special arrangement with Mrs. Sinclair and on her responsibility, and contrary to their own judgment, and without the knowledge of the appellant, that this stock was retained, therefore the trustees were barred by their own actings from claiming relief against the appellant's estate.

The power given to continue to hold the stocks was a power only to do so during the administration of the trust funds until appropriated; or alternatively, a power to retain them in appropriation. The deed gave a power to sever the trust funds, and they submitted the trustees had done so, and had represented to each lady that a separate investment was made for each, and that interest was held on certain specified stock for their behoof; and therefore the legacies forming two distinct and separate trust estates, the one was not liable for the loss resulting from the other. At all events the trustees were not entitled to relief against the £125 retained out of the residue, which was kept by them solely to meet possible depreciations on the investments made for the appellant.

862[* [They cited *Brownlie v. Brownlie*(¹); *Ballard v. Marsden*(²).]

Mr. Chitty, Q.C., and Mr. C. J. Pearson (with them Mr. Benjamin, Q.C.), contended for the respondent, that on a true construction of the deed the trustees were justified in retaining the City of Glasgow Bank stock. They were empowered to hold all or any of the stocks, and this power was peculiarly appropriate to that portion of the testatrix's estate which was to be held to meet the legacies. The trustees obtained a transfer of the existing investments into their own names as the trustees under Mrs. Fraser's trust disposition, and continued to hold them in pursuance of the power enabling them to do so and in reliance on the express clause as to indemnity.

It was not shown that the trustees surrendered their discretion, or acted against their better judgment, if the discretion or power was exercised within the powers, and *bona fide* fault could not be found with them, nor could their power to hold the stock without consulting either beneficiary be demitted by their consulting one of them. There was no power to appropriate, nor was it correct to say the legacy funds were severed into two. Statements were rendered to both ladies, which showed certain funds were held as producing the respective income, only as a matter of

(¹) Court Sess. Cas., 4th series, vol. vi, p. 1233.

(²) 14 Ch. D., 374.

convenience and purely provisional as a matter of book-keeping; but there never was any real or actual separation. The funds remained vested as before, in the trustees' names, as trustees of the testatrix.

The deed of discharge was a half-hearted measure, and the fact that they retained £124 out of the residue showed the trustees did not consider that they had made any final appropriation. They submitted that, assuming there was an appropriation, such an appropriation as here—the setting aside of two sums on account of income—could not be held to deprive the trustees of their lien over the whole trust estate and right of indemnity over the whole funds which lawfully remained under their control. The trustees had accepted the trust, and therefore must be indemnified against the consequences resulting from that position.

*[They cited *Jervis v. Wolferstan* (1); *Phené v. Gillan* (2); *Noble v. Brett* (3); *March v. Russell* (4); *Chippendale v. German Mining Company* (5); *Exhall Coal Company v. Bleckley* (6).]

The Solicitor-General for Scotland, in reply.

The Law Lords having taken time to consider, delivered judgment as follows:

Ang. 3. THE LORD CHANCELLOR (Lord Selborne): My Lords, the two first questions to be determined in this case are, whether the authority given by the trust disposition and settlement of Mrs. Fraser to her trustees to continue to hold any of her shares in public or other companies enabled them to set apart and appropriate, for the second and third purposes respectively of that settlement, the bank shares and other securities, which they did, in fact, retain for those purposes; and whether, if they had that authority, it was duly exercised?

Upon the first point it was argued that, because the power for the trustees "to continue to hold" the shares, &c., "should they consider it advisable or expedient to do so," is followed, in the settlement, by a power also "to lend or place out" the two legacies of £2,000 each, "on such security or securities, heritable or movable, as they shall consider advantageous," the former power could not properly be used for the investments contemplated by the latter, but must be construed as merely authorizing some delay, which might not otherwise have been proper, in the conversion of

(1) Law Rep., 18 Eq., 18; 9 Eng. R., 674.

(2) 5 Hare, 1.

(3) 24 Beav., 499, at p. 509.

(4) 3 My. & Cr., 31.

(5) 4 D. M. & G., 19, at p. 54.

(6) 35 Beav., 449, at p. 453.

the truster's shares, &c., in public companies before the distribution of her residuary estate. I think that this is not a necessary, and that it would not be a reasonable, construction of the settlement. A power to "continue to hold" particular investments, made by the truster herself (without more) must, I think, be taken, *prima facie*, to refer to those trusts which were to continue; and the only continuing trusts, in this case, were those expressed in the second and third purposes of the settlement.

Upon the second point, I cannot concur in the view which 864] *seems to have been taken by some of the learned judges in the Court of Session, that, because the trustees on the 20th of November, 1876, stated it to be their view that bank stock was not a suitable class of stock for trustees to hold, their subsequent decision to hold £200 City of Glasgow Bank stock for the investment of part of the legacy of £2,000, given to Mrs. Sinclair and her children, ought to be regarded as an abdication of their duty of judgment, and for that reason a breach of trust. When the truster had expressly authorized the retention, for the purposes of the trust which she created, of these investments made by herself of which some were to her knowledge of a character not free from risk, and were at the same time productive of a variable amount of income, those facts alone could not make it a breach of trust for the trustees to act upon that authority, although their own preference might have been for securities unattended with any risk. The truster did not, indeed, direct them to take into consideration the wishes or the opinions of the life-renters, but I think it was proper and reasonable for them to do so, as long as they did not unduly favor the life-renters at the expense of their children, or either set of legatees at the expense of the other. In this case I find no indication of any improper purpose. It is true that some risk was necessarily incident to every such investment in bank stock, but there was no special reason for believing (and it is plain to me that neither the trustees nor Mrs. Sinclair did believe) that this particular investment in stock of the City of Glasgow Bank was attended with any extraordinary risk, which might not equally attach to shares or stock in any other well-established bank in Scotland. This stock, at the time of the appropriation, bore, and was valued at, a price sufficient to prove the credit in which the City of Glasgow Bank then stood, and to make the gain to the life-rentrix in point of income very inconsiderable. I am satisfied that the trustees acted in good faith, and that their decision to retain this stock was an honest

exercise of the discretion given to them by the will. It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, *in the [865 end, objections to which they had thought it right in the first instance to direct attention.

These investments, therefore, having been *bona fide* retained under sufficient authority, the next question is, whether the appropriations, as they were actually made, had the effect of severing the funds and securities set apart and appropriated for the second purpose of the will from those set apart and appropriated for the third purpose, so that the latter would not thenceforth be liable to make good any subsequent loss or deterioration of value sustained by the former, as between the two sets of beneficiaries? If such a severance was possible, it appears to me to be clear, that the intent and the effect of the discharge of the 22d of March and 31st of May, 1877, was to make it. And not only was such a severance legally possible, but it also appears to me to have been the most proper (if not the only proper) mode of fulfilling the directions of the will. Before the residue of the truster's estate could be distributed, provision was to be made, by some authorized investment or appropriation, for these two legacies, given to different families under separate purposes of the will, and necessarily payable at different periods of time. If different sets of trustees had been nominated for them it would have been impossible to contend that, after the fund appropriated to each had been transferred to its proper trustees, there could be any subsequent community of loss or gain between them as to either income or capital; or that either fund was to be, in any way, responsible for the other. It cannot, in my opinion, make any difference, that the same persons were trustees for both, and were also trustees for the general purposes of the will. The English authorities, collected in the first volume of Mr. White's (4th) edition of *Roper on Legacies*, p. 942, rest upon principles equally applicable on both sides of the Tweed.

From this conclusion it seems to me to be a necessary consequence that neither the beneficiaries under the third purpose of this will, nor the trustees, could have any right to be indemnified against a loss sustained on the City of Glasgow Bank stock, at the expense of the appellant, or of the funds and securities set apart for the appellants' legacy.

So far as the trustees were concerned, the retention of this 866] bank stock, as an investment of part of the *legacy given to the Sinclair family under the second purpose of the will (together with the personal liability incident to it), was their own voluntary act. That liability was not undertaken for the general purposes of the will, which necessarily ceased when the residue was divided; but only for the purpose of this particular Sinclair trust. The retention of such stock necessarily involved risks of trade, and entitled the trustees to be indemnified from those risks out of the trust funds of the legatees for whom it was held. But to employ other funds set apart for other legatees in the same or any other trade, there was no authority. To do so would have been, in my opinion, a breach of trust. Here, again, the principles of well-known English authorities, *Ex parte Garland* (*); *Ex parte Richardson* (*); *Cutbush v. Cutbush* (*); *McNeillie v. Acton* (*) are in point, and they appear to me to be as much applicable in Scotland as in England.

The result, therefore, is, that I am unable to concur in the interlocutors of the Court of Session now under appeal; and that I think those interlocutors ought to be reversed, and decree of suspension and interdict granted as prayed by the appellant, with expenses below, and with the costs of this appeal; and I so move your Lordships.

LORD BLACKBURN, having stated the purposes of the trust deed, and, *inter alia*, the fact that Mrs. Fraser died possessed of £850 stock of the Glasgow Bank then valued at £1,955, continued:

I do not think that it can be doubted that, in the absence of something in the trust deed to the contrary, the duty of the trustees would have been to dispose of this stock, involving, as it did, a possible liability, which most people at that time thought would never come into operation, but which in fact did, within three years, come into operation in a very disastrous way. But Mrs. Fraser had expressly provided that her trustees might continue to hold such stock or shares as might belong to her at the time of her death, should they consider it advisable or expedient to do so. 867] *The Lord Ordinary came to the conclusion of fact that the trustees retained the £200, which they did retain, not because they deemed it advisable or expedient so to do, but because they surrendered their own judgment to that of Mrs. Sinclair.

(*) 10 Ves., at p. 119.

(*) Buck., at p. 209.

(*) 1 Beav., at p. 187.

(*) 4 D. M. & G., 750 *et seq.*

I do not differ from the propositions of law involved, though not expressed, in this opinion. I think that trustees who incur a liability which, having reference to the trust which they have accepted, they ought not to incur, cannot claim to be indemnified for so doing out of the trust funds; on the contrary, they in general are liable personally to make good any loss which the trust funds have sustained in consequence of their so acting contrary to their duty. And I further agree that trustees are to exercise their own discretion. But I think they may inquire as to what are the wishes and opinions of others, especially of those who are interested, before they finally determine what, in the exercise of their own discretion, they think expedient, and I think that in this case there is no evidence that the trustees did more than they properly might. The Lord Ordinary seems to ground his opinion principally on a letter of the 28th of November, 1876. Mr. Murdoch was a member of a firm of writers, Murdoch & Macpherson, at Huntly, and that firm acted for the trust. In that letter, which, whether it was composed by Mr. Murdoch or his partner Mr. Macpherson, binds Murdoch as a member of the firm, it is said that their brokers recommended that this stock should be realized, "and our own" (that is the firm's) "view that bank stock is not a suitable class of stock for trustees to hold." This was not, however, the view which Mrs. Fraser, the framer of the trust, had entertained; and, though I suppose every one connected with the matter now regrets that this view of the firm was not acted upon, I can see nothing to justify the conclusion that the trustees did not, in the exercise of their own discretion, *bona fide*, though, as it turns out, unfortunately, come to the conclusion that it was expedient to continue to hold this £200. I therefore differ from the Lord Ordinary on the inference of fact to be drawn from the letters.

Lord Gifford says:

It appears that Mrs. Fraser, the truster, at the time of her death, held various stocks in railways and other companies, and, in particular, she held £850 of the *consolidated stock of the City of Glasgow Bank. It was in reference [868 to this condition of her estate, as I think, that she inserted in her trust deed the following clause: "With power also to my trustees to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained." The question is, what is the true construction and what is the true effect of this clause? Now it is contended that this is a general clause perfectly unlimited, which entitled the trustees not only to defer the winding up of the trust and the paying of the general residue for some indefinite but reasonable time, and until they found it expedient to sell or realize any shares in joint stock companies which might be temporarily depressed, but it is said

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it was a general power entitling the trustees to select and continue as the permanent investment of the two special legacies of £2,000 each, all or any of the bank stocks or other stocks of which the testatrix might die possessed. After full and repeated consideration, I am really unable to come to this conclusion. I think it contrary to the very explicit powers and directions which the testatrix had given in reference to the two legacies of £2,000 each, and contrary to the very conception of these legacies themselves. The truster knew, or she had been told, and quite rightly and properly told, that it would be the duty of her trustees immediately after her death to sell out and realize all her shares in trading, joint stock, and other companies, and she knew, or she had been told, that this was their duty, even if at the time of realization it should happen that the market was depressed or unfavorable for the realization of high prices for such descriptions of property. I think she intended to provide for this contingency, and no other. She gave her trustees a certain latitude or discretion that they might abstain from selling for such reasonable time as they might consider expedient, and she exempted them from personal responsibility if they should deem it expedient to delay realization. But all this had reference to her general trust. This discretionary power was granted to the trustees in order to save the estate from loss from forced realization at an unfavorable time, to the disadvantage of the residuary legatees. It was for the benefit of the residuary legatees, who were interested only in the residue, that the realization should not be hurriedly made, and made at a loss. The possible risk of loss from unfavorable realization had really little or nothing to do with two specific legacies of £2,000 each, which were quite fixed in amount, and the beneficiaries in which, as such, had no concern with how the residue might turn out, or whether the stocks in public companies were sold at a time of depression or not. So long as there was a residue at all—and the residue here was £1,200—it did not matter to the special legatees, who, as such, had only fixed pecuniary legacies, what loss might occur in the realization of the general estate, so long as the realization was not so low as to destroy the residue altogether. That was the concern of the residuary legatees, and these were the whole three children of the testatrix. The continuing to hold stocks which formed part of the trust estate, and the abstaining from selling or selling or realizing them, was, I think, all to be before the division of the general residue, and before the payment or the lending out of the pecuniary legacies. The clause, I think, was not intended to govern, and had no reference to the permanent management and investment of the special legacies of £2,000 each—a management which might endure for many a long 869] year, and *for which the trust deed makes separate and ample provision. This is the conclusion to which I have been forced to come, though not (as I have said, and especially after hearing your Lordships' opinions) without difficulty and hesitation. It leads to the result that it was *ultra vires* of the trustees to take £200 of the stock of the City of Glasgow Bank as part of the investment of the legacy of £2,000 which Mrs. Sinclair and her children are interested in.

If this was the true construction of the deed, I think that the trustees could not maintain any claim to be reimbursed from the trust estate for a liability which they ought not to have incurred, whatever might be their claim against the personal interest of those at whose instance and for whose benefit they incurred the liability. But I cannot agree in this construction. I think that if Mrs. Fraser had meant to give her trustees a discretion to continue to hold the stocks only until the residue was realized and no longer, she would have said so in plain terms, which she certainly has not done. I need not inquire what would have been the case if the trustees had invested some of the money in the purchase of

more City of Glasgow Bank stock, that is not what they did. But Mrs. Fraser thought that she had invested her property well, and therefore allowed her trustees to continue to hold any of those stocks, though she did not direct them so to do. On this part of the case I agree with the Lord Justice Clerk and Lord Ormidale, and need not repeat their reasons.

But this does not dispose of the case. The complainer's pleas in law below contain these: [Reads them as given above.]

The pleas in law for William Murdoch are, amongst others: [Reads.]

Which is right depends, in my opinion, mainly upon the true construction of the trust instrument, which regulates what the trustees could do; but partly on the inference to be drawn by the court from the documents as to what they did do.

This is, in my opinion, the most difficult part of the case; and I am here obliged to differ from the majority of the court below, both as to the fact and as to the law, for I think the second and third pleas in law for the complainer below are well founded, and that it is not made out that the case is such that the three pleas of the respondent Murdoch apply to it. I do not think it necessary to form any opinion as to the fourth plea of the complainer.

The trustees are by the trust deed required, before paying over *the residue, to make provision for payment of [870 the legacies, and they are empowered "to lend or place on such securities heritable or movable as they shall consider advantageous the aforesaid legacies of £2,000 and £2,000 respectively, the said securities to be conceived in favor of my trustees, and that for the purposes of this trust and not otherwise," and to vary the securities from time to time. I have already given my reasons for thinking that they might continue to hold any of the stocks belonging to Mrs. Fraser at the time of her decease, though not such as trustees would generally be justified in holding, and were not bound to sell them and invest the £2,000 and £2,000 in other securities. And I think, therein agreeing with Lord Gifford, and differing from the Lord Justice Clerk, and perhaps from Lord Ormidale, though of that I am not quite sure, that the true construction of the trust deed is such that the trustees, if not required to sever the securities for the two sums of £2,000 and £2,000, and set aside certain securities for the one legacy and certain securities for the other, were at least empowered to do so; and I think that they have done so,

the two being from the time they so did two distinct branches of the trust for two distinct parties. It certainly, where the trusts remaining to be fulfilled are for the benefit of different parties and quite independent of each other, would be the ordinary and convenient course to do so; and I cannot resist the conclusion from the words of the trust deed that Mrs. Fraser, or rather those who drew up the deed for her, meant that ordinary and convenient course to be followed. It was argued at your Lordships' bar that if such was the intention it ought to have been provided that there should be, or at least might be, separate trustees for the Sinclair family and the Robinson family, and that in the trust deed now under consideration not only are the same trustees originally appointed, but the power to assume fresh trustees is so worded as to show that they must always be the same.

I quite agree that the intention, if it be what I think it is, could have been more clearly expressed. If it had been provided that the securities for the Sinclair £2,000 should be invested in the names of the original trustees and such persons as they might from time to time appoint as trustees for the Sinclair £2,000, and a similar provision made as the [871] Robinson £2,000, no one could have doubted that the trusts were intended to be severed. It is because this is not so clearly expressed that the question is one of difficulty. The Lord Justice Clerk seems to have thought it not a question of any difficulty. He takes the opposite view from that which I do, but he hardly explains his reasons for that opinion. Lord Gifford gives his reasons for taking the view which I take. Lord Ormidale says:

The separation and allotment of the trust estate referred to consisted in nothing more than book entries and accounts made, so far as I can discover, for no other purpose than convenience in dealing with the interest of two separate individuals, Mrs. Sinclair and Mrs. Robinson. There was certainly no transference or investment in any form of the bank stock in the name of Mrs. Sinclair. It was held at the last and throughout, as it was at the commencement of the trust, in the names of the trustees for the purposes of the trust. Supposing, however, that such a separation and allotment as that alleged by the suspender did take place, the bank stock still continued part of the trust estate as it had previously been. Nor can I find anything in the deed of discharge which was executed by the parties interested, after the trustees had laid aside what they at the time considered sufficient to meet the two legacies of £2,000 each. On the contrary, I find that in the trust deed it is expressly declared that the securities for these legacies "shall be conceived in favor of my trustees, and that for the purposes of this trust and no otherwise." Keeping this in view, and that Mrs. Sinclair and Mrs. Robinson were respectively only entitled to the annual rent or interest arising out of the two legacies of £2,000, the capital sum ultimately going on their deaths to others, it cannot admit of doubt, I think, that there were no new and separate trusts in reference to these legacies contemplated by the trustor, or could have been created under the deed of settlement.

The inference I draw from the documents, more particu-

larly the deed of discharge, and Messrs. Murdoch and Macpherson's mode of stating it in their books, is that the trustees did (if they had power to do so) sever the investments, for the behoof of the Sinclairs, from those for behoof of the Robinsons, and declare that the £2,000, less legacy duty, held for behoof of Mrs. Robinson and her children was invested in the stocks, which are now the subject of the interdict. I think this was done for convenience in dealing with the interest of two separate families, and it is principally because I think this so obviously convenient and usual in such cases, that I put the construction on the words of the trust deed, that the intention was to authorize, if not require, this to be done, though I think that this intention might have been more clearly expressed.

If this is right, I think that the second plea of the complainer *correctly states the law, and that the right [872 which the trustees have to come upon the fund for indemnity is limited to the trust funds on account of which the £200 bank stock was retained, and so the liability was incurred.

The Lord Justice Clerk says, that the amount of the calls which the trustees paid was "a direct debt of the maker of the trust for which the whole of her trust funds in the hands of the trustees must be liable." I think, if it was a direct debt of Mrs. Fraser, the whole of her funds whether included in the trust or not would be liable; but I cannot agree that it ever was a debt from her at all. It did not accrue till more than two years after her death, and the liability is incurred not because the shares had been hers at the time of her death, but because her trustees chose (justifiably, as I think, though most unfortunately) to continue to hold them till after the bank stopped, and that according to the view I take they did for the benefit of the Sinclair family, and not for the benefit of the maker of the trust or the trust generally.

It was argued that the maker of a trust is personally bound to indemnify the trustees for all costs and liabilities properly incurred in the execution of the trust, but I do not think this is the law. No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him; this principle applies to many cases, and where a trust is for the benefit of the maker of the trust it may apply to a trustee. *Balsh v. Hyam* (*) is a good example of a case where it did apply, and there are many others. In *Jervis v. Wolferstan* (†) the Master of the Rolls

(†) 2 P. Wms., 453.

(*) Law Rep., 18 Eq., at p. 24; 9 Eng. R., 11.

goes so far as to say, "I take it to be a general rule that where persons accept at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust." Perhaps this rule is too broadly stated, as something must depend on the nature of the trust and of the interest of the *cestui que trust*, but it is not necessary now to say more than that this rule has no application to a case where the maker of the trust is not a *cestui que trust*. When he is not, I think he cannot merely as maker of a trust be so liable. The trustee voluntarily accepts the trust, 873] *and can only incur liability in consequence of his own act in so accepting; unless there be an express or implied bargain for indemnity from the maker of the trust, he must be taken to accept the trust relying on the trust funds. He has, no doubt, a right to charge the trust funds with all just allowances.

Lord Cottenham, in *Attorney-General v. Mayor of Norwich* (*), states the rule thus, "I apprehend it to be quite clear according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust." But this, I think, does not extend so far as to enable them to apply all funds, part of the property which they took in trust, and of which they are not divested, in relief of expenses incurred on behalf of a separate branch of the trust, and not at all on behalf of the funds from which it is sought to obtain relief. In *Attorney-General v. Lawes* (*), Wigram, V.C., states it to be "a well settled rule that, where a legacy has been severed from the bulk of an estate, and become the subject of litigation, that particular fund, and not the general estate, is to bear the costs." If this was merely a rule of practice as to costs, however well settled it might be in England, it could have no effect in a Scotch case, but it seems to me to be an application of a general principle, which, I should think, must be the same in every system of jurisprudence in which trusts exist. That principle is, I think, involved in the decision of Lord Eldon in *Ex parte Garland* (*). There a miller made his will, dated the 17th of February, 1798. He left

(*) 2 My. & Cr., at p. 424.

(*) 10 Ves. Jun., 110.

(*) 8 Hare, at p. 43.

all his personal property to three trustees, one of whom was his wife, Margaret Ballman. He also appointed them his executors, but that I think not material. By the will the testator directed that his trade of a miller, and the farming business then carried on by him, should be carried on by Margaret Ballman until his trustees should think proper to establish his sons or either of them therein; and he directed his trustees, upon so *settling his sons or either of [874] them in the business, to permit them to take off the stock, crop, and other effects in the said business at a fair valuation, and to take a bond or note from them for the amount. He also directed that, as long as the businesses should be carried on by his wife, the profits thereof should be applied for her own use and for the maintenance and education of his children, and that an inventory and valuation of his stock, crop, and effects in said businesses should be taken within six weeks after his decease, and that any sums not exceeding £300, which, by a codicil, he increased to £600, should be paid by his trustees to Margaret Ballman out of his personal estate, for the purpose of enabling her to carry on the businesses, and that she should give notes of hand to the other trustees for the sums so advanced to her, and the amount of the valuation.

It is not stated when the testator died, probably it was not long after the date of his will. After his death Margaret Ballman carried on the trades till December, 1801, when she became bankrupt. She had given notes of hand to the trustees for the sum of £1,351 5s., the amount of the valuation, and £600 which they had advanced to her in pursuance of the directions in the will. She also had received £768 12s. 4d. of the testator's assets. The surviving trustee proved under the commission. The assignees presented a petition praying that the proof might be expunged, and that it might be declared that the whole of the personal estate of the testator was liable to all the debts contracted by the bankrupt in carrying on the trades under the directions of the will. The Lord Chancellor expressed a clear opinion that the surviving trustee, as a creditor on the notes, must be postponed to the creditors of the bankrupt, but directed a further argument as to the other point.

The counsel for the assignees argued that if a trustee is directed to carry on a trade, and does so, he makes himself personally liable to the whole of the debts contracted in that trade, which, hard as it may be, is clearly law. He then argued that it followed that he must have the right of resorting for his indemnity to the whole personal estate

given to him with a direction to carry on the trade; and that it followed that the creditors must have it, at least by circuitry, to the same extent.

875] *Lord Eldon, however, said that the case of the executor was no doubt very hard, as he might be proceeded against as a bankrupt, though he was but a trustee, "but he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility." He says that the creditors "have something very like a lien upon the estate embarked in the trade, they have not a lien upon anything else." No more is said as to the argument that the trustee had a personal right to indemnity, and that, consequently, her assignees had a similar right at least by circuitry.

The extent of the right which trustees have to be indemnified, and the manner in which creditors can by circuitry work it for their own benefit, were discussed by the Master of the Rolls in *In re Johnson* (*). The Master of the Rolls there says what *Ex parte Garland* decides is "that the claim of the creditors is limited to the assets devoted to trade."

On the question whether the whole assets of the testator were directly liable to the debts incurred in the trade which the testator directed to be carried on, Lord Eldon proceeds very much on the general inconvenience that would be produced if the estate could not be wound up effectually so long as the trade was carried on, perhaps for a century. In the case before him the trade had not been carried on for more than two years, and at most a few months more, but in laying down the law he had to consider what might have happened. I think it clearly must have been the Lord Chancellor's opinion that the trustee who, of his own choice, placed himself in the situation of incurring liability for a trade which the framer of the trust directed to be carried on with a particular part of his assets, had no right to come for indemnity upon the rest of the assets. And this is, I think, the guiding principle to be applied in this case, as soon as it is determined that the two branches of the trust, that for the Sinclair family and that for the Robinson family, were severed. On that subject I have already said what is my view. I think, therefore, that the interlocutor of the Lord Ordinary was right, though not for the reason given in his note; and that the appeal should be allowed, with costs, and that interlocutor restored.

(*) 15 Ch. D., 548.

***LORD WATSON:** I am of opinion that the inter- [876
locutors under appeal ought to be reversed, and that the
judgment of the Lord Ordinary, which was approved by
Lord Gifford, one of the three judges of the Second Division,
ought to be restored. It is necessary to explain the grounds
upon which I have come to that conclusion, because I con-
cur in part only of the opinion of Lord Gifford, and am un-
able to assent to the reasons assigned by the Lord Ordinary
for his judgment.

The trusts of the late Mrs. Fraser's settlement are not
complicated. After providing, in common form, for pay-
ment of her debts, death-bed and funeral expenses, the tes-
tatrix appoints her trustees to make payment of the
interest or annual rent of £2,000 to her daughter Mrs. Sin-
clair during her lifetime, and of the capital to her children
after her decease, and to make payment, in like manner, of
the interest or annual rent and of the capital of another sum
of £2,000 to her daughter Mrs. Robinson and her children.
The testatrix then bequeaths £5 to each of her trustees, and
directs them, after payment of debts, and after "making
provision for payment of the legacies above mentioned," to
divide the free residue of the trust estate equally between
her son, James Robb, and her two daughters, Mrs. Sinclair
and Mrs. Robinson.

The estate falling under the trust, amounting in value to
£5,000, or thereby, consisted chiefly of railway stocks, and
of £850 consolidated stock of the City of Glasgow Bank,
which was duly transferred to the respondent, William Mur-
doch, and his co-trustee, James Fraser Robb. The trustees,
in the course of their administration, sold bank stock to the
extent of £650; and after paying debts, expenses, and mi-
nor bequests, they proceeded to make provision for payment
of the two legacies of £2,000 to the daughters of the tes-
tatrix and their issue, by appropriating to them severally the
remaining stocks which had belonged to the testatrix, at their
current value in the market. In this division, the unsold
balance of £200 City Bank stock was, with the knowledge
and consent of Mrs. Sinclair, appropriated to her and her
children, as representing part of their £2,000. The funds
remaining in the hands of the trustees, after such appropri-
ation, were equally divided among the three residuary lega-
tees. These arrangements *are narrated in detail in [877
a deed of discharge executed by the residuary legatees in
March and May, 1877. It proceeds upon the recital that
the trustees "have invested" each of the two legacies of
£2,000 upon the respective stocks therein specified; and in

respect that they had been paid or received credit for their several shares of the remainder, the residuary legatees thereby exoner the trustees of their whole actings and management, and discharge all claims of residue competent to them under the provisions of the deed of trust. The books and accounts of the trust show that, from the time the two legacies were thus severed, each of the daughters of the testatrix received the income of the stocks which had been assigned to herself and her family, under deduction of expenses applicable to her own stocks.

It appears to me that all these acts of administration were authorized by the terms of the trust deed, and were therefore *intra vires* of the trustees.

Lord Gifford was of opinion that, in assigning these stocks to the beneficiaries, the trustees acted in excess of their powers; and it would certainly have been their plain duty to realize, had not the testator given them express power "to continue to hold all or any of such shares or stocks, in public or other companies, as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained." His Lordship held that this was not a continuing power applicable to all the purposes of the trust, but merely a power to delay realization, and consequently to postpone the distribution of the residue. I am unable to adopt that view. A general power to retain stocks in which the testatrix has already invested does not differ, in its scope, from a general power to invest in these stocks. What the trustees can do in the one case by making a new, they can effect in the other case by retaining an old investment; and in the present instance the terms of the power are wide enough to cover all purposes of the trust requiring investment. I therefore think that the trustees were entitled in their discretion to retain these stocks, as an investment of the £2,000 legacies, instead of realizing the stocks, and then investing £4,000 upon movable or heritable securities.

The Lord Ordinary decided against the respondent in this 878] *appeal, on the ground that, in retaining the £200 City Bank stock as part of Mrs. Sinclair's legacy, the trustees did not act within the power entrusted to them by the testatrix, that they surrendered their independent judgment, and acted in accordance with the wishes of Mrs. Sinclair, and against their own convictions. There does not appear to me to be any evidence sufficient to bring such a serious charge home to the trustees. No doubt they did

consult the beneficiary most interested in the matter, and what they did had her approval; but I do not think there is ground for the inference that the trustees did not regard the retention of the bank stock as a proper act of administration, or that they thought it would be attended with any appreciable risk either to the beneficiaries or to themselves.

I am further of opinion that the trustees had power to sever these £2,000 legacies, and to place them in separate investments for behoof of the respective beneficiaries. The trust deed authorizes them to lend out upon certain securities "the foresaid legacies of £2,000 and £2,000 respectively," and these words appear to me to confer upon the trustees, by plain implication, a right to make the severance if they chose. It may be doubted whether, in the due administration of the trust, the trustees could have declined to sever these legacies, but in the view which I take of the case it is unnecessary to decide that point.

If, instead of severing the two legacies, the trustees had been entitled and had thought fit to make provision for their payment by retaining in their hands an undivided fund of £4,000, the present question could hardly have arisen, assuming always that the trustees had power to retain the £200 City Bank stock as a trust investment, after distribution of the residue. In that case the two families of Sinclair and Robinson would have been equally interested in the investment, they would have shared in any increment of the value of the stock, and would have borne alike any loss arising from its depreciation. I did not understand it to be disputed, and I think it clear that, had matters stood in that position, the trustees would have been entitled to recoup calls paid by them to the liquidators of the City Bank out of the remaining funds or stocks held by them for the purpose of paying the two legacies.

The real question in this case, according to my apprehension of *it, comes to be—What was the effect of the [879 severance of the two legacies upon the right of indemnity competent to these trustees so long as they held, and were justified in holding, the trust estate as an undivided whole? I cannot agree with the opinion expressed by the late Lord Ormisdale, one of the two judges composing the majority of the Second Division, to the effect that the appropriation of the stocks held by the trustees consisted of mere book entries made for convenience in dealing with the interest of the life renters, Mrs. Sinclair and Mrs. Robinson. The appropriation of these stocks, if authorized, as I hold it to have been, by the terms of the trust deed, was an act of

administration which the trustees of themselves had no power to undo. The immediate effect of that act was to alter the pecuniary interests of the two sets of beneficiaries concerned, and the relations subsisting between them and the trustees. The beneficial interests of Mrs. Sinclair and her issue on the one hand, and of Mrs. Robinson and her children on the other, were thenceforth limited to the stocks severally assigned to them, and the trustees ceased to be under any liability to account to either life-rentrix and her children for the stocks appropriated to the others. Two trusts were created instead of one, with separate funds, and different beneficiaries having no community of interest. Such being the legal result of the appropriation, it is, in my opinion, immaterial whether the authority to constitute these two trusts was derived from one and the same deed, or whether each was constituted by virtue of a separate deed under the hand of the testatrix.

In that state of circumstances I am at a loss to conceive upon what principle of law or equity the respondent can claim to be indemnified for loss arising upon the £200 City Bank stock appropriated to Mrs. Sinclair, out of the funds assigned to the appellant and her children. There is no positive rule of law upon which such a claim can be supported, and I do not know of any equitable claim to indemnity, recognized by the law of Scotland, which does not rest upon the maxim of the civil law, "*Cujus est commodum ejus quoque debet esse incommodum.*" Those authorities in the law of England to which your Lordships have referred lead to precisely the same result. It may be a hard thing that the respondent has personally to bear loss arising upon 880] a trust *investment in which he had no personal interest; but he voluntarily undertook the risk when he consented to hold City Bank stock as trustee for behoof of Mrs. Sinclair and her children. In my opinion it would be a still harder thing to inflict that loss upon the appellant, who had as little personal interest in the matter as the respondent, but, unlike the respondent, had no power either to prevent such an investment of Mrs. Sinclair's legacy, or to protect herself from its consequences.

In the court below, the Lord Justice Clerk decided in favor of the respondent, solely on the ground that the calls made by the liquidators of the City Bank constituted a debt of the truster, Mrs. Fraser, and, if that assumption had been well founded, it appears to me that the judgment of the Second Division would have been right. But it seems clear that these calls were never, in any sense, a debt due

by the truster or by her estate. The claim of the liquidators was a claim against the trustees personally, arising out of that course of administration by which they became and continued to be partners of the bank. But if any doubt could be raised on this point, it is completely disposed of by the judgment of Lord Eldon in *Ex parte Garland* ⁽¹⁾.

I therefore concur in the judgment proposed by your Lordship.

JUDGMENT.—*Ordered* and *Adjudged*, That the said interlocutors of the Lords of Session of Scotland, of the Second Division, of the 10th of March and 18th of May, 1880, complained of in the said appeal, be, and the same are hereby reversed, and that the interlocutor of the Lord Ordinary, of the 6th of January, 1880, be, and the same is hereby restored: And it is *Ordered*, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment: And it is further *Ordered*, That the respondents do pay or cause to be paid to the said appellant the costs incurred by her in respect of the said appeal to this House, and also her expenses in the court below.

Lords' Journals, 3d August, 1881.

Agents for appellant: *Holmes, Anton & Greig*.

Agents for respondent: *Martin & Leslie*.

⁽¹⁾ 10 Ves., at p. 119.

[6 Appeal Cases, 881.]

H.L. (Sc.), May 17, 1881.

[HOUSE OF LORDS.]

881] *COMMISSIONERS OF SUPPLY OF THE COUNTY OF
 ABERDEEN, *Appellants*; MORICE, *Respondent*.

Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict., c. 51), ss. 4, 5, 6, 7, and 37—Construction of.

The trustees of the W. S. bridge, which spans the River Dee and connects the counties of Kincardine and Aberdeen, sought to have it found that the local acts 10 Geo. 4, c. 43, and 28 Vict., c. 26, being the W. S. Bridge and Road Acts—had ceased to be of force and effect within the county of Kincardine (that county having adopted the Roads and Bridges Act, 1878): That the trustees have ceased to be under any obligation as regards the management or maintenance of the bridge or road, and that the defenders, the county road trustees of Kincardine, and the commissioners of supply of the county of Aberdeen, are bound to maintain and keep in proper repair the bridge and road: and further, that the trustees have ceased to be liable for the debts incurred by them as trustees. By the local act of 1865 tolls were abolished in the county of Aberdeen; but from its provisions the burgh was excluded. The Aberdeenshire portion of the road and part of the bridge are within the burgh boundary.

The county of Aberdeen has not adopted the act of 1878, and the commissioners of supply of that county deny any liability in respect to the maintenance, &c., of the bridge and road:

Held, reversing the interlocutors of the court below, that the true effect of the Roads and Bridges Act, 1878, in the circumstances, was to continue in force the local acts so far as the powers and duties thereby imposed on the trustees for the management, &c., of that part of the bridge and road which is within the county and parliamentary burgh of Aberdeen, together with the powers of demanding and taking tolls within the county and burgh conferred by such acts so long as the Roads and Bridges Act, 1878, shall not be in force therein: that the liability of the trustees to the debts incurred under the local acts had now ceased and fallen severally upon the defenders: that the commissioners of supply are entitled to receive from the W. S. bridge and road trustees all surplus of income accruing to them from tolls exacted on the bridge and road within the county and parliamentary burgh of Aberdeen, after providing for the expenses of management, &c., and on doing so, are entitled to be relieved by them from the proportion of the debts belonging under the Roads and Bridges Act, 1878, to the county and parliamentary burgh of Aberdeen; and that as regards that part of the bridge and roads within the county of Kincardine, the local acts had ceased to be in force; and the road trustees of that county are bound to maintain and keep in repair that part of the bridge and road.

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A.

ACCEPTANCE.

See **BILLS OF EXCHANGE**, 99, 129 *note*.

ACCEPTOR.

See **BILLS OF EXCHANGE**, 99, 129 *note*.
PRINCIPAL AND SURETY, 217, 236 *note*.

ACCOUNTING.

1. General directions as to the mode of taking the account. *Wallingford v. Mutual Society.* 65

ACCOUNTS.

See **MISTAKES**, 347.

ADMIRALTY.

1. *Collisions*. The "Regulations for Preventing Collisions at Sea," made under the authority of the Merchant Shipping Acts, 1854 to 1873, must, under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance.

The K. and the V., two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The K. alleged that when the two vessels were fast approaching each other the V. improperly changed its course; that the master of the K. could not rely on the V. taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the regulations, which directed that in such a case the engines should be stopped and reversed. The Court of Admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the Court of Appeal had held the master of the K. to be excused under the circumstances of the case, and had given judgment against the V. On appeal to this House:

Held, that the statutes and the regulations had not left the master of the K. a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger, he had disregarded the regulations, and consequently that the K. must be held in part responsible.

2. The judgment of the Court of Admiralty was restored. *Stoomvaart, etc., v. Peninsular, etc.* 169, 200 *note*.
3. *Demurrage*. A charterparty for a ship to sail to "London Surrey Commercial

Docks" is not satisfied by the ship arriving at the gate of the docks but not entering into the docks.

4. There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks.

5. The charterparty was to "London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material.

6. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat) and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf:

Held, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading.

7. The contract in the charterparty as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days demurrage over and above the said laying days" [there were no laying days mentioned in the charterparty] "at £30 per day, payable day by day, it being agreed that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from

along side the ship at merchant's risk and expense."

8. The ship did not fulfill the engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks.

9. When that difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges.

Held, that he was warranted in so doing. *Dahl v. Nelson*. 259

10. *Pilot*. Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam-tug, the latter is bound to obey the orders of the pilot. In case of a mischief occurring to the vessel, occasioned directly by the conduct of the steam-tug, the tug (which had not noticed the pilot's signal), cannot in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the ground that if the pilot, when the mischief was about to happen, had himself done a certain thing, the mischief might possibly have been avoided. *Spaight v. Tedcastle*. 389, 398 note.

ADVERSE POSSESSION.

1. Ceylon Ordinances No. 8 of 1834, and No. 22 of 1871, require that a defendant should have had ten years' undisturbed and uninterrupted possession,

meaning actual and not ideal possession, of land in dispute in order to be entitled to the benefit of such ordinances.

2. Although acts done upon parts of a district of land may be evidence of possession of the whole, yet as regards lands within a disputed boundary acts of ownership by either party outside the boundary are no evidence of title to the lands within it. *Clark v. Anderson*. 848

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34 ENG. REP.

BILLS OF EXCHANGE.

1. Sect. 11 of the Mercantile Law Amendment (Scotland) Act, 1856, is in the same terms with sect. 6 of the corresponding English Act: and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorized by him."

On the 2d of March, 1878, in *Hindhaugh v. Blakey* (8 C. P. D., 136), it was held that an acceptance by the drawee was null in respect that there was no writing except the signature.

On the 16th of April, 1878, was passed the Bills of Exchange Act, which, after reciting the above quoted section of the Mercantile Law Amendment Acts; and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not, and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consist merely of the signature of the drawee written on such bill."

A. procured from B. an advance of £1,000 on a bill of exchange at twelve months for C. and D., his two sons. B. signed the bill as drawer, and addressing it to C. and D., handed it to A., who forwarded it to C. and D. They signed it as acceptors, and sent it back to A., who wrote his own name across the back, and gave it to B. He then forwarded the amount to C. and D.

Subsequently C. and D. became bankrupt, and were unable to pay the amount of the bill. A. and B. being both dead, there was no exact evidence why A. put his name on the bill. C. and D. had previous to the date of the bill obtained money from B. on their own security. The trustees of B. claimed from A.'s representative the amount of the bill on the ground that A. indorsed the bill as "joint obligant" with C. and D., "and as co-acceptor with them for payment of its contents":

Held, affirming the decision of the court below, although not upon the same reasons, that A.'s representative was not liable, because that A. was not an acceptor within the meaning of 19 & 20 Vict. c. 60, s. 11, or otherwise, in any true and proper sense of the word;

and that his liability, as insisted upon by B.'s trustees, could only be established by proof of a special contract to be answerable to the drawer for the acceptors, which contract, being different from that which the law-merchant would infer from his mere signature as it appears on the back of the bill, could only be proved by a writing properly signed under, in Scotland, the 6th section of 19 & 20 Vict. c. 60; and in England the 29 Car. 2, c. 3, s. 4, which writing was here absent.

2. *Held*, also, that the act of 1878 was in effect a declaration by the Legislature that the decision in the case of *Hindhaugh v. Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish act between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessarily to displace the whole construction of the English statute on which that decision was founded.

3. *Per LORD WATSON*: The character in which A. did become a party to the bill was both in fact and law that of an indorser; and in determining his legal position, the fact that his indorsement was written before the bill was delivered to the drawer, and the money advanced by him, was quite immaterial.

4. The doctrine deduced from *Don v. Watt* (26 May, 1812, F. C., vol. xvi, 647), and *Walters* (7 March, 1818, F. C., vol. xix, 489), by Professor Bell in his Commentaries, vol. i (7th ed.), p. 425, that in Scotland a signature as an acceptor by a person not a drawee "held to import a joint undertaking as acceptor of the bill or maker of the note" not approved of: see Lord Watson's opinion at p. 779. *Steele v. McKinlay*. 99, 129 note.

See FORGERY, 301, 329 note.

PRINCIPAL AND SURETY, 217, 236 note.

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CONTINGENT SECURITY.

1. The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer., 585) that debt was discharged. The bank, without giving notice to the purchaser, continued the

administration which the trustees of themselves had no power to undo. The immediate effect of that act was to alter the pecuniary interests of the two sets of beneficiaries concerned, and the relations subsisting between them and the trustees. The beneficial interests of Mrs. Sinclair and her issue on the one hand, and of Mrs. Robinson and her children on the other, were thenceforth limited to the stocks severally assigned to them, and the trustees ceased to be under any liability to account to either life-rentrix and her children for the stocks appropriated to the others. Two trusts were created instead of one, with separate funds, and different beneficiaries having no community of interest. Such being the legal result of the appropriation, it is, in my opinion, immaterial whether the authority to constitute these two trusts was derived from one and the same deed, or whether each was constituted by virtue of a separate deed under the hand of the testatrix.

In that state of circumstances I am at a loss to conceive upon what principle of law or equity the respondent can claim to be indemnified for loss arising upon the £200 City Bank stock appropriated to Mrs. Sinclair, out of the funds assigned to the appellant and her children. There is no positive rule of law upon which such a claim can be supported, and I do not know of any equitable claim to indemnity, recognized by the law of Scotland, which does not rest upon the maxim of the civil law, "*Cujus est commodum ejus quoque debet esse incommodum.*" Those authorities in the law of England to which your Lordships have referred lead to precisely the same result. It may be a hard thing that the respondent has personally to bear loss arising upon 880] a trust *investment in which he had no personal interest; but he voluntarily undertook the risk when he consented to hold City Bank stock as trustee for behoof of Mrs. Sinclair and her children. In my opinion it would be a still harder thing to inflict that loss upon the appellant, who had as little personal interest in the matter as the respondent, but, unlike the respondent, had no power either to prevent such an investment of Mrs. Sinclair's legacy, or to protect herself from its consequences.

In the court below, the Lord Justice Clerk decided in favor of the respondent, solely on the ground that the calls made by the liquidators of the City Bank constituted a debt of the truster, Mrs. Fraser, and, if that assumption had been well founded, it appears to me that the judgment of the Second Division would have been right. But it seems clear that these calls were never, in any sense, a debt due

by the truster or by her estate. The claim of the liquidators was a claim against the trustees personally, arising out of that course of administration by which they became and continued to be partners of the bank. But if any doubt could be raised on this point, it is completely disposed of by the judgment of Lord Eldon in *Ex parte Garland* ⁽¹⁾.

I therefore concur in the judgment proposed by your Lordship.

JUDGMENT.—*Ordered and Adjudged*, That the said interlocutors of the Lords of Session of Scotland, of the Second Division, of the 10th of March and 18th of May, 1880, complained of in the said appeal, be, and the same are hereby reversed, and that the interlocutor of the Lord Ordinary, of the 6th of January, 1880, be, and the same is hereby restored: And it is *Ordered*, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment: And it is further *Ordered*, That the respondents do pay or cause to be paid to the said appellant the costs incurred by her in respect of the said appeal to this House, and also her expenses in the court below.

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 ABERDEEN, *Appellants*; MORICE, *Respondent*.

Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict., c. 51), ss. 4, 5, 6, 7, and 87—Construction of.

The trustees of the W. S. bridge, which spans the River Dee and connects the counties of Kincardine and Aberdeen, sought to have it found that the local acts 10 Geo. 4, c. 43, and 23 Vict., c. 26, being the W. S. Bridge and Road Acts—had ceased to be of force and effect within the county of Kincardine (that county having adopted the Roads and Bridges Act, 1878): That the trustees have ceased to be under any obligation as regards the management or maintenance of the bridge or road, and that the defenders, the county road trustees of Kincardine, and the commissioners of supply of the county of Aberdeen, are bound to maintain and keep in proper repair the bridge and road: and further, that the trustees have ceased to be liable for the debts incurred by them as trustees. By the local act of 1865 tolls were abolished in the county of Aberdeen; but from its provisions the burgh was excluded. The Aberdeenshire portion of the road and part of the bridge are within the burgh boundary.

The county of Aberdeen has not adopted the act of 1878, and the commissioners of supply of that county deny any liability in respect to the maintenance, &c., of the bridge and road:

Held, reversing the interlocutors of the court below, that the true effect of the Roads and Bridges Act, 1878, in the circumstances, was to continue in force the local acts so far as the powers and duties thereby imposed on the trustees for the management, &c., of that part of the bridge and road which is within the county and parliamentary burgh of Aberdeen, together with the powers of demanding and taking tolls within the county and burgh conferred by such acts so long as the Roads and Bridges Act, 1878, shall not be in force therein: that the liability of the trustees to the debts incurred under the local acts had now ceased and fallen severally upon the defenders: that the commissioners of supply are entitled to receive from the W. S. bridge and road trustees all surplus of income accruing to them from tolls exacted on the bridge and road within the county and parliamentary burgh of Aberdeen, after providing for the expenses of management, &c., and on doing so, are entitled to be relieved by them from the proportion of the debts belonging under the Roads and Bridges Act, 1878, to the county and parliamentary burgh of Aberdeen; and that as regards that part of the bridge and roads within the county of Kincardine, the local acts had ceased to be in force; and the road trustees of that county are bound to maintain and keep in repair that part of the bridge and road.

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A.

ACCEPTANCE.

See **BILLS OF EXCHANGE**, 99, 129 *note*.

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See **BILLS OF EXCHANGE**, 99, 129 *note*.
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1. General directions as to the mode of taking the account. *Wallisford v. Mutual Society.* 65

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ADMIRALTY.

1. *Collisions*. The "Regulations for Preventing Collisions at Sea," made under the authority of the Merchant Shipping Acts, 1854 to 1873, must, under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance.

The K. and the V., two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The K. alleged that when the two vessels were fast approaching each other the V. improperly changed its course; that the master of the K. could not rely on the V. taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the regulations, which directed that in such a case the engines should be stopped and reversed. The Court of Admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the Court of Appeal had held the master of the K. to be excused under the circumstances of the case, and had given judgment against the V. On appeal to this House:

Held, that the statutes and the regulations had not left the master of the K. a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger, he had disregarded the regulations, and consequently that the K. must be held in part responsible.

2. The judgment of the Court of Admiralty was restored. *Slootvaart, etc., v. Peninsular, etc.* 169, 200 *note*.
3. *Demurrage*. A charterparty for a ship to sail to "London Surrey Commercial

Docks" is not satisfied by the ship arriving at the gate of the docks but not entering into the docks.

4. There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks.
5. The charterparty was to "London Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material.
6. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the Deptford Buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat) and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf:
Held, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading.
7. The contract in the charterparty as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days demurrage over and above the said laying days" [there were no laying days mentioned in the charterparty] "at £30 per day, payable day by day, it being agreed that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from

along side the ship at merchant's risk and expense."

8. The ship did not fulfill the engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks.
9. When that difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges.
Held, that he was warranted in so doing. *Dahl v. Nelson.* 259
10. *Pilot.* Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam-tug, the latter is bound to obey the orders of the pilot. In case of a mischief occurring to the vessel, occasioned directly by the conduct of the steam-tug, the tug (which had not noticed the pilot's signal), cannot in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the ground that if the pilot, when the mischief was about to happen, had himself done a certain thing, the mischief might possibly have been avoided. *Spaight v. Tedcastle.* 389, 398 *nota*.

ADVERSE POSSESSION.

1. Ceylon Ordinances No. 8 of 1834, and No. 22 of 1871, require that a defendant should have had ten years' undisturbed and uninterrupted possession,

meaning actual and not ideal possession, of land in dispute in order to be entitled to the benefit of such ordinances.

2. Although acts done upon parts of a district of land may be evidence of possession of the whole, yet as regards lands within a disputed boundary acts of ownership by either party outside the boundary are no evidence of title to the lands within it. *Clark v. Anderson*.

843

See SOVEREIGN, 835.

SUPPORT, 742, 885 note.

AGREEMENTS.

See PERFORMANCE, 201, 213 note.

ANSWER.

See FRAUD, 65, 79 note.

APPURTENANCES.

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ATTACHMENT.

See JURISDICTION, 495, 522 note.

B.

BANKS.

See TAXES, 152.

BANKRUPTCY.

See SALE, 657 note, 727.

34 ENG. REP.

BILLS OF EXCHANGE.

1. Sect. 11 of the Mercantile Law Amendment (Scotland) Act, 1856, is in the same terms with sect. 6 of the corresponding English Act: and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorized by him."

On the 2d of March, 1878, in *Hindhaugh v. Blakey* (8 C. P. D., 136), it was held that an acceptance by the drawee was null in respect that there was no writing except the signature.

On the 16th of April, 1878, was passed the Bills of Exchange Act, which, after reciting the above quoted section of the Mercantile Law Amendment Acts; and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not, and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consist merely of the signature of the drawee written on such bill."

A. procured from B. an advance of £1,000 on a bill of exchange at twelve months for C. and D., his two sons. B. signed the bill as drawer, and addressing it to C. and D., handed it to A., who forwarded it to C. and D. They signed it as acceptors, and sent it back to A., who wrote his own name across the back, and gave it to B. He then forwarded the amount to C. and D.

Subsequently C. and D. became bankrupt, and were unable to pay the amount of the bill. A. and B. being both dead, there was no exact evidence why A. put his name on the bill. C. and D. had previous to the date of the bill obtained money from B. on their own security. The trustees of B. claimed from A.'s representative the amount of the bill on the ground that A. indorsed the bill as "joint obligant" with C. and D., "and as co-acceptor with them for payment of its contents":

Held, affirming the decision of the court below, although not upon the same reasons, that A.'s representative was not liable, because that A. was not an acceptor within the meaning of 19 & 20 Vict. c. 60, s. 11, or otherwise, in any true and proper sense of the word;

ESTATE TAIL.

See WILLS, 540.

ESTOPPEL.

See FORGERY, 801, 829 *note*.

EVIDENCE.

1. The report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the government, is not necessarily admissible in the courts here, as evidence of all the facts stated therein.

2. M., the consul in London for the then Genoese Government, applied in 1789 to his government to receive the rank and employment of diplomatic agent here. The executive government (Collegii) referred the application to a committee called the Giunta della Marina to inquire into the propriety of the proposed change of appointment, and into M.'s fitness for the post of diplomatic agent. The Giunta reported favorably on both points. In the course of the report the Giunta described him as "a native of Quarto, of about forty-five years of age." He was appointed in 1790, and died in England in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the Crown, but, on a process instituted here, a decree was made directing payment of the fund to certain persons of the Freccia family, who claimed to be next of kin, and whose claim was founded on an allegation that M. had been born at St. Ilario near Genoa in 1735. Other persons then claimed to be next of kin, asserting that M. had been born at Quarto in 1744. In a suit between these two sets of claimants the report of the Giunta was tendered in evidence as fixing the real place and time of M.'s birth:

Held, that it was not admissible for that purpose.

3. *Per* LORD BLACKBURN: "A public document" means a document that is

made for the purpose of the public making use of it—especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it. *Sturle v. Freccia*. 1

4. To prove or disprove marriage. *Dyart Peerage*. 550, 618 *note*.

See MARRIAGE, 480.

EXECUTORS AND ADMINISTRATORS.

1. When legacies to different persons separated so loss on investment of one not chargeable to investment of other. *Fraser v. Murdock*. 837

F.

FACTOR.

See TITLE, 41, 59 *note*.

FOREIGN CORPORATIONS.

See CORPORATIONS, 489.

FOREIGN JUDGMENT.

See JURISDICTION, 495, 522 *note*.

FORFEITURE.

See PENALTY, 65, 79 *note*.

FORGERY.

1. A person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the

fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel.

2. The names of A. and B. appeared on a bill as drawers and indorsers to the B. L. Co. The B. L. Co.'s Inverness bank discounted it for C., who signed it as acceptor. They had had no previous dealings with A. or B. Being dishonored when due, notice to that effect was sent to A. and B., and received late on a Saturday, but they did not communicate with the bank. On the following Monday, being the 14th of April, C. brought to the B. L. Co. a blank bill with A. and B.'s names as drawers and indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill but for a less amount, the difference being paid in cash by C. Three days before it was due, notice was sent to A. and B., and again when it was dishonored, and then through the B. L. Co.'s law agent. A fortnight after the first notice the B. L. Co. were informed for the first time that A. and B.'s signatures were forgeries, and they declined to pay the amount in the bill. A. alleged that he called on C. on the 14th of April about the first bill, that C. admitted that he had forged his name, handed him the bill, and solemnly assured him that it had been taken up by cash; and so assured he did not think it necessary to communicate with the bank. He admitted that on that day he drank with C. and borrowed £4 of him. He denied positively any knowledge of the second bill until he received the bank notices. C. was convicted of the forgery. The B. L. Co. charged A. with payment of the bill on the ground that he had either authorized the use of his name, or had subsequently adopted and accredited the bill, and therefore was estopped from denying his liability:

Held, reversing the decision of the court below, that in the facts proved A. had neither authorized nor assented to the use of his name; nor did the circumstances of the case raise any es-

toppel against him. *McKenzie v. British Linen Co.* 801, 829 *note*.

FRAUD.

1. A general allegation of fraud, however strong the words used, where there is no statement of the circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice.
2. Therefore, an account directed to be taken in this case, where such an allegation had been made, was directed to be taken without regard to this insufficient allegation of fraud. *Wallingford v. Mutual Society.* 65, 79 *note*.

See COVENANTS, 218.

G.

GAMING.

1. A society constituted (avowedly) for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts. *Wallingford v. Mut. Society.* 65

H.

HABEAS CORPUS.

See JURISDICTION, 689.

HIGHWAYS.

1. The trustees of the W. S. bridge, which spans the River Dee and connects the counties of Kincardine and Aberdeen, sought to have it found that the local acts 10 Geo. 4, c. 43, and 23 Vict., c. 26, being the W. S. Bridge and Road Acts—had ceased to be of

force and effect within the county of Kincardine (that county having adopted the Roads and Bridges Act, 1878): That the trustees have ceased to be under any obligation as regards the management or maintenance of the bridge or road, and that the defenders, the county road trustees of Kincardine, and the commissioners of supply of the county of Aberdeen, are bound to maintain and keep in proper repair the bridge and road: and further, that the trustees have ceased to be liable for the debts incurred by them as trustees. By the local act of 1865 tolls were abolished in the county of Aberdeen; but from its provisions the burgh was excluded. The Aberdeen shire portion of the road and part of the bridge are within the burgh boundary.

The county of Aberdeen has not adopted the act of 1878, and the commissioners of supply of that county deny any liability in respect to the maintenance, &c., of the bridge and road:

Held, reversing the interlocutors of the court below, that the true effect of the Roads and Bridges Act, 1878, in the circumstances, was to continue in force the local acts so far as the powers and duties thereby imposed on the trustees for the management, &c., of that part of the bridge and road which is within the county and parliamentary burgh of Aberdeen, together with the powers of demanding and taking tolls within the county and burgh conferred by such acts so long as the Roads and Bridges Act, 1878, shall not be in force therein: that the liability of the trustees to the debts incurred under the local acts had now ceased and fallen severally upon the defenders: that the commissioners of supply are entitled to receive from the W. S. bridge and road trustees all surplus of income accruing to them from tolls exacted on the bridge and road within the county and parliamentary burgh of Aberdeen, after providing for the expenses of management, &c., and on doing so, are entitled to be relieved by them from the proportion of the debts belonging under the Roads and Bridges Act, 1878, to the county and parliamentary burgh of Aberdeen; and that as regards that part of the bridge and roads within the county of Kincardine, the local acts had ceased to be in force; and the

road trustees of that county are bound to maintain and keep in repair that part of the bridge and road. *Commissioners v. Morrie*. 862

See EASEMENT, 826.

HUSBAND AND WIFE.

1. Where the husband neither does, nor assents to, any act to show that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact.
2. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise where such management did not exist.
3. A. was the manager of a limited company's hotel at Bradford—where his wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbade her to pledge his credit for them. She purchased clothes in London, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication:

Held (affirming the judgment of the court below), that the husband was not liable—that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust the wife. *Dobson v. Mellon*. 245, 257 note.

I.

INCOME.

See REVENUE, 488.

INCOME TAX.

See TAXES, 458.

INDICTMENT.

See CRIMINAL LAW, 399, 418 note.

INDORSEH.

See PRINCIPAL AND SURETY, 217, 236 note.

INTEREST.

1. In the absence of special agreement simple interest only can be charged in a mortgage account. *Daniel v. Sinclair*. 347

INTERNATIONAL LAW.

See CORPORATIONS, 489.
MARRIAGE, 480, 550, 613 note.

INTERPRETATION.

See STATUTES, 383 and note.

J.

JUDGMENT.

See CONTINGENT SECURITY, 723, 738 note.
JURISDICTION, 495, 522 note.

JURISDICTION.

4. The process against a garnishee, to enforce obedience to the jurisdiction of the Lord Mayor's Court in foreign attachment, is personal, and cannot be applied to a corporation aggregate.
2. Where, therefore, a corporation aggregate was cited, as garnishee, to appear in the Lord Mayor's Court, it was held entitled to maintain prohibition.
3. The suit of foreign attachment is founded upon ancient custom, and in itself is perfectly valid. The process by which it is sought to be enforced must be strictly pursued according to the custom. Fictitious summonses and returns will render the suit invalid. *Mayor, etc., of London v. London Joint Stock Bank*. 495, 522 note
4. A representation having been made against a clerk, rector of a parish within the county palatine of Lancaster, in the province of York, under the Public Worship Act, 1874, for offences against sect. 8 of that act committed in the parish church, the bishop of the diocese sent the matter to the Archbishop of York, who sent a requisition to Lord Penzance—the judge appointed under the act, who had since the passing of the act become official principal of the Chancery Court of York—requiring him to hear and determine the matter of the representation at any place in London or Westminster, or within the province of York or diocese of Manchester, as he might deem fit. The judge heard it at Westminster, and there pronounced judgment, and issued a monition ordering the clerk to abstain from the practices complained of. The clerk having disobeyed the monition the judge, sitting at Westminster, issued an inhibition inhibiting the clerk for three months and thereafter until relaxation from performing any service of the church within the diocese, and on his persisting in his disobedience, pronounced him contumacious and issued a *significavit* under 53 Geo. 3. c. 127, s. 1. The tenor of the *significavit* was sent by *mittimus* from the Petty Bag Office to the Chancellor of the county palatine of Lancaster. In accordance with an order made by the Vice-Chancellor of the county palatine sitting at Lincoln's Inn a writ *de contumace capiendo* was issued, under which the clerk was arrested by the sheriff of Lancashire and lodged in Lancaster gaol. On a motion for a *habeas corpus*:
Held (affirming the decision of the Court of Appeal), that the matter so heard before the judge, as official prin-

cipal of the Chancery Court of York, was a cause cognizable in an Ecclesiastical Court within the meaning of 53 Geo. 3, c. 127, s. 1, and that the judge had power to pronounce the contumacy and issue the *significavit* under that act:

5. That the county palatine being one of the exempt jurisdiction mentioned in 5 Eliz. c. 28, s. 11, the procedure required by that section as to the *mittimus* and the issue of the writ *de contumace capi-endo* was applicable and was duly followed:
6. That the *mittimus* was not one of the writs referred to in Order II, rule 8, of the rules of the Supreme Court, and was properly tested as in the name of the Queen by the Master of the Rolls:
7. That under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 86), s. 9, the judge had power not merely to "hear" but also to hear and determine the matter, and to do all the acts which he did at Westminster:
8. That all the proceedings were regular and there was no ground for a *habeas corpus*. *Green v. Lord Penzance*. 689

See PRINCIPAL AND AGENT, 666.

L.

LANDLORD AND TENANT.

1. Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, *inter alia*, "by the end of the policy" of the landlord: and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, *inter alia*, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road the property of the landlord, which, before it reached the tenant's works, ran through another tenant's stone pavement yard. This

was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*.

2. The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that, either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":

Held, reversing the decision of the court below, that under the agreement the stipulation was that the tramway should pass outside the walls which inclose the policy of the landlord; and that by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway.

3. A landlord entered into an agreement with a tenant, the terms of which were dictated by the landlord to a person who acted as his factor. The agreement was then handed unsigned to the tenant, who was present. The factor's name did not appear in the agreement, nor had he any authority to make the agreement for the landlord. Subsequently the tenant resiled from the agreement:

Held, affirming the decision of the court below, that the writing was not a valid holograph writ, and therefore the tenant could resile from it.

4. Lord Watson doubted whether the document would be valid even if the factor had been the sole negotiator acting in the landlord's absence and by his instructions. *Sinclair v. Cathlamet*, etc. 458

LEASE.

See LANDLORD AND TENANT, 458.

LEGACIES.

1. When two separated, so loss on investment of one not chargeable to investment of other. *Fraser v. Murdoch*. 837

See WILLS.

LEX LOCI.

See CORPORATIONS, 489.

MARRIAGE, 480, 550, 618 note.

LIBEL.

See DEFAMATION, 386.

LIGHTS.

See ADMIRALTY, 169, 200 note.

M.

MANDATE.

See REMITTITUR, 550.

MARRIAGE.

1. According to the Roman-Dutch law there is a presumption in favor of marriage rather than of concubinage.
2. According to the law of Ceylon, as in England, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.
3. Where it is proved that they have gone through a form of marriage, and thereby shown an intention to be married, *held*, that those who claim by virtue of

the marriage are bound to prove that all necessary ceremonies have been performed. *Sastry v. Sembecully*. 480

4. The law of Scotland accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of Scotland.

5. Cohabitation outside Scotland will not constitute marriage, although it may be competently founded on, either as corroborative evidence of a ceremony in Scotland, or as evidence that a ceremony proved to have taken place in Scotland was truly intended by the parties as a present interchange of matrimonial consent.

A. alleged that she was lawfully married to B. by interchange of mutual consent *de presenti* before witnesses in 1844 in Scotland, and that having remained in Scotland for about a month, B. and she cohabited at divers places in England as husband and wife, and that a son now living was born of the marriage in 1863.

Between 1844 and 1849, when B. deserted A., three daughters were born, one of whom B. registered as legitimate. In 1851 B. married C. at a parish church in England and had children. A. was informed of this marriage shortly after its celebration, but took no steps to have the validity of the averred irregular Scotch marriage of 1844, or the nullity of the marriage of 1851, judicially declared, until 1880. The alleged witnesses to A.'s marriage were admitted now to be dead, but they were alive in 1853, when they might have been judicially examined in an action brought against B. for the board and lodging of A.:

Held, that the evidence completely disproved the allegation of a marriage between A. and B.

6. B. married C. *in facie ecclesie* in 1851, had issue, and died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness gave evidence that B. told him repeatedly after 1851 that A. was his wife and not C.:

Held, that such evidence was not admissible.

7. Effect of the statute 37 & 38 Vict., c. 64 (1874), *held* not necessary to decide.

8. In an attempt on the part of A. to set up an irregular marriage according to the law of Scotland between herself and B., statements prepared by D., the plaintiff, in an action against B. as the alleged husband of A. for A.'s board and lodgings; which statements were signed—and in one case corrected by interlineations—by deceased persons who, if alive, would have been competent witnesses, were sought to be used as evidence :

Held, that they were not admissible. *Dysart Peerage Case*. 550, 613 *note*.

MARRIED WOMEN.

See HUSBAND AND WIFE, 245, 257 *note*.

MINES.

See EMINENT DOMAIN, 132.
SUPPORT, 528, 538 *note*.

MISTAKES.

1. Where such mortgage account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding the mortgage deed to require the same :

Held, that such settled account might be re-opened.

2. Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law; yet in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. *Daniell v. Sinclair*. 847

MORTGAGE.

See CONTINGENT SECURITY, 723, 738 *note*.
REDEMPTION, 701.

MORTGAGE FORECLOSURE.

See PENALTY, 65, 79 *note*.

N.

NAVIGABLE RIVERS.

1. The Clyde Navigation Trustees, being empowered by sects. 76 and 84 of 21 & 22 Vict. c. 149, to dredge the bed of the river Clyde to a depth of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their acts of Parliament.

Held so, affirming the decision of the court below, but without prejudice to the question of their liability to subsequent compensation for damage. *Blantyre v. Clyde, etc.* 439 and *note*

See EMINENT DOMAIN, 690.

NECESSARIES.

See HUSBAND AND WIFE, 245, 257 *note*.

NEGLIGENCE.

See ADMIRALTY, 169, 200 *note*; 389, 398 *note*.
TRUSTS AND TRUSTEES, 837.

NEW TRIAL.

See PRACTICE, 688.

NOTICE.

See CONTINGENT SECURITY, 723, 738 *note*.

NUISANCE.

See EMINENT DOMAIN, 356, 378 *note*.

O.

OFFICERS.

See PRINCIPAL AND AGENT, 666, 674 *note*.

P.

PARTITION.

1. Owners of three-sixteenths of a property sought to have a sale of it; owners of thirteen-sixteenths of it objected to a sale and offered to purchase the shares of the others at a valuation. In the court of the Vice-Chancellor a valuation was ordered under the provisions of the 5th section of the 31 & 32 Vict. c. 40. The Court of Appeal decided that the case fell under the 3d section of that act, that the 5th section did not qualify or control the 3d, nor operate as a proviso upon it, and so the decision below was reversed, and a sale was directed:

Held, by LORD BLACKBURN and LORD WATSON (LORD HATHERLEY dissenting), that the decision of the Court of Appeal was correct, and must be affirmed.

2. A party asking for a sale is not compellable to part with his share on a valuation. *Pitt v. Jones*. 29

PARTNERSHIP.

1. A prosperous company came to consist of three partners, A., B., and C., having equal shares. The contract of copartnership contained, *inter alia*, a
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clause that it should not be in the power of any of the partners to assign all or any part of their shares or interest in the capital stock, or profits of the concern to any person or persons, or give them a right to inspect the company's books, or to interfere in any way with the business; and should any such assignation be granted the same was declared of no effect so far as regards the company. There was also a clause that on the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. A. entered into an agreement by which he sold to B. his whole interest. A.'s name remained on the books, and he signed all deeds relating to the business till his death seven years after. C. was not till then informed of the agreement. He then claimed to participate on the grounds of (1) an alleged mandate to B. to purchase for the company A.'s interest; (2) that the agreement could only be legally made under the contract of copartnership with his consent; and (3) that B. had secretly acquired a benefit for himself within the scope of the partnership business:

Held, affirming the decision of the court below, that in point of fact no agreement had been made between B. and C. to the effect that B. was to buy A.'s interest for the partnership. And in respect to the articles of copartnership, they did not prevent the agreement being made, and otherwise it was perfectly legal. Therefore C. was not entitled to any benefit under it. *Cassels v. Stewart*. 282, 299 *note*.

PATENTS.

1. Where a patentee, whether English or foreign, has obtained foreign patents, they should be stated to their Lordships and the fullest information afforded as to the profits thereof.
2. An English patent may be renewed though a foreign one has been taken out and allowed to expire.
3. A patentee should preserve the clearest evidence of everything which has been paid and received on account of

the patent. Whether or not his remuneration has been adequate, his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term. *Matter of Adair's Patent*. 343

PAYMENT.

1. No payment, but a payment made by compulsion of law, can discharge a garnishee from his original liability to his creditor. *Mayor of London v. London Joint, etc.* 495

PENALTY.

1. In a mortgage bond, given to secure the due payment, by instalments, of a sum due, a provision making the total sum due enforceable on any default, is not to be considered a penalty. *Wallingford v. Mut. Society*. 65, 79 note.

PERFORMANCE.

1. F. who was about to employ M. in a situation of trust and confidence, effected a policy with a Guarantee Company to secure himself against fraud by embezzlement of money by M. The policy, which was for £1,000, declared that "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy," the company undertook to reimburse any pecuniary loss sustained by the employer from "the fraud or dishonesty of the employed, as should amount to embezzlement of money, as should be discovered within three months of the death, dismissal, or retirement of the employed." The employer was to give notice of the claim, and proofs were to be given such as the directors for the time being might require. Then followed this proviso: "Provided that the employer shall if, and when, required by the company (but at the expense of the company, if a conviction be obtained), use all diligence in prosecuting the employed to conviction for any fraud or dishonesty (as aforesaid) in consequence of which a claim shall have been made under

this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement, by the employed, or by his estate, of any moneys which the company shall have become liable to pay." F. claimed under this policy a sum of money alleged to have been lost by M.'s embezzlement. The directors pleaded that they had required F. to prosecute M., but that F. had not done so. Demurrer, because it did not appear that there was any obligation for F. to prosecute M., or that the non-performance of any such obligation, was a condition precedent to F.'s right to recover.

Held, reversing the judgment of the court below (THE LORD CHANCELLOR (Lord Selborne) *diss.*), that the proviso did constitute a condition precedent, and furnished a defence to the action. *London Guarantee Co. v. Fearnley*. 201, 213 note.

2. If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.
3. By a written contract A. agreed to buy of B. a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "C." cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine:

Held, affirming the decision of the court below, that B. was entitled to a decree against A. for payment of the price of the machine. *Mackay v. Dick*. 419, 439 note.

PETITION OF RIGHT.

See PRINCIPAL AND AGENT, 666.

PILOT.

See ADMIRALTY, 389, 398 note.

PLEA.

See FRAUD, 65, 79 note.

PLEADINGS.

*See DEFAMATION, 386.
FRAUD, 65, 79 note.
PERFORMANCE, 201, 213 note.*

PLEDGE.

See TITLE, 41, 59 note.

PRACTICE.

1. Upon a rule *nisi* calling upon the plaintiff in an action upon a policy of life insurance to show cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for the defendant pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the defendant; and for misdirection in that the jury had not been directed on the evidence to find for the defendant; the Court of Queen's Bench for Ontario ordered the verdict for the plaintiff to be set aside and the same to be entered for the defendant, while the Supreme Court eventually reversed this order and restored the verdict for the plaintiff, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence:

Held, that although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the plaintiff and direct

a verdict to be entered for the defendant in direct opposition to the finding of the jury on a material issue. Under 38 Vict. c. 11 (Canada), the Supreme Court has power to make any order or to give any judgment which the court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by sect. 22 in this case, in which the court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.

2. Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. *Connecticut, etc., v. Moore.* 688

PRESCRIPTION.

See SUPPORT, 742, 835 note.

PRESUMPTION.

See MARRIAGE, 480.

PRINCIPAL AND AGENT.

1. In a suit against Her Majesty's Deputy Commissary-General for Natal, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as the price or hire of certain wagons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employees, and for general damage:

Held, on exceptions by the defendant to the jurisdiction of the court and to the declaration, that the defendant could not be sued, either personally or

in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; and that there was no cause of action against him.

2. The Government revenue cannot be reached by a suit against a public officer in his official capacity.
3. *Quare*, whether the court would have had jurisdiction if a petition of right had been presented and the Crown had ordered that right should be done. *Palmer v. Hutchinson*. 666, 674 note.

See FORGERY, 301, 329 note.

HUSBAND AND WIFE, 245, 257 note.

TITLE, 41, 59 note.

PRINCIPAL AND SURETY.

1. The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor.
2. He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities.
3. The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship.
4. S. C. R., one of the partners of S. R. & Sons, in December, 1874, deposited with the N. & S. W. Bank the title deeds of two of his own freehold properties, and signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W. Bank might advance to the firm in the way of discounts.

In November, 1875, D. & Co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest which was declined. D. & Co. were customers of the N. &

S. W. Bank. R. & Sons said if D. & Co. would inquire of those bankers they would find it would be all right with the R. bills. The bank manager refused to discount the bill without the indorsement of D. & Co., but said that he believed D. & Co. would incur no more than a nominal liability by putting their names on the bill. D. & Co. thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, R. & Sons stopped payment. The bill became due in February, and was dishonored. D. & Co., who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills, brought an action against the N. & S. W. Bank to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill:

Held, that D. & Co. were sureties on the bill, and that as such they were entitled to the benefit of these securities. *Duncan v. North, etc.* 217, 236 note.

PROHIBITION.

1. In 1874 a suit was instituted by letters of request in the Arches Court, according to the provisions of the 3 & 4 Vict. c. 86 (the Church Discipline Act) against a clerk for unlawful practices in the performance of divine service. A sentence of suspension *ab officio* for six weeks was pronounced against him, and he was "monished" not to repeat the practices. He did repeat them, and was again admonished. He continued to repeat them, was twice summoned before the court to answer, but did not appear; and in June, 1878, the Dean of the Arches "pronounced, decreed, and declared that" the acts alleged to have been done by the clerk, had been fully proved, "and that in so doing he had repeated the offences alleged against him in the articles exhibited against him in this suit," and had thereby disobeyed and contravened the monitions served upon him. "For which disobedience the judge did pronounce him to have been guilty

of contumacy. And for the conduct aforesaid the judge did farther decree and declare" that he should be suspended *ab officio et beneficio* for three years:

Held, that this was a matter of ecclesiastical procedure alone, and was not, therefore, the subject of a proceeding in prohibition.

2. The suspension was only a step in the proceedings which had been regularly instituted in 1874, and was in itself perfectly regular.

3. *Per* LORD BLACKBURN: The temporal court, proceeding in prohibition, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters. *Mackonochie v. Penzance*. 528

See JURISDICTION, 495, 522 *note*.

R.

RAILWAYS.

See EMINENT DOMAIN, 99.

RATIFICATION.

See FORGERY, 301, 329 *note*.

REDEMPTION.

1. The mortgagor of one property assigned the equity of redemption, and afterwards mortgaged another property to the mortgagee of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the mortgages:

Held (affirming the decision of the Court of Appeal), that the right of the purchaser of an equity of redemption cannot be affected by a mortgage created after the purchase, and that the assignee was entitled to redeem the first mortgage without redeeming the second.

2. Also that under Order xvi, rule 7, trustees of an equity of redemption sufficiently represent their *certainis que trust* in a redemption suit, no direction to the contrary having been made by the court. *Jennings v. Jordan*. 701

RELIGIOUS TRIAL.

See PROHIBITION, 528.

REMITTITUR.

1. When a decision of the Judicial Committee has been reported to Her Majesty and has been sanctioned it becomes the decree or order of the final Court of Appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution. *Pitts v. La Fontaine*. 550

REVENUE.

1. The tax imposed by sect. 4 of New Brunswick Act, 31 Vict. c. 36, upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss. *Lawless v. Sullivan*. 488

See TAXES, 152.

REVERSAL.

See SECURITY, 65.

REVOCATION.

See WILLS, 540.

RIGHT, PETITION OF.

See PRINCIPAL AND AGENT 666.

S.

SALE.

1. By the law of Scotland there must be delivery to give effect to a contract of sale, but the Mercantile Law Amendment (Scotland) Act for the express purpose of assimilating the law of Scotland to that of England on such points, enacts: "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same."

B. & C., by verbal communing, agreed to make advances to A. on the security of a ship he had nearly completed building on his own account, provided A. entered into an absolute contract of sale of the vessel. An unqualified contract of sale was completed by which A. agreed to complete and deliver to B. & C. the vessel, for a price to be paid in two instalments, with power to B. & C., in the event of A. failing to complete the contract, to enter into possession of the vessel and complete it, or sell it.

In a correspondence between A. and B. & C. and a shipbroker and others subsequent to the contract, and for the purpose of getting a purchaser for the vessel, the ship was called A.'s ship; but no letters were written to any persons who were induced by their means to deal with the ship upon the footing of its being the property of A.

From the date of the contract B. & C. gave, by checks at various dates, advances to A., taking a receipt on account of the purchase of the ship; at the same time bills for like amounts were accepted by A. The advances equalled the full price of the ship. Before it was completed or delivered

A.'s estate was sequestrated. The bills accepted by A. were paid by B. & C. In a question between A.'s trustee and B. & C.:

Held, (1) affirming the decision of the court below, that there was here a *bona fide* sale in fact and intent unaccompanied by delivery, and—whether security was the object or not—every condition of the statute was fulfilled; (2) that no reputation of ownership had been created in the seller A. Therefore B. & C. had a right to the ship.

2. *Held*, where there is an absolute *bona fide* contract of sale of an article, which is not delivered before the bankruptcy of the seller, the right of the buyer under the contract to have delivery cannot be defeated by proof that the character of buyer had been conferred on him merely for the purpose of his having a security for money intended to be advanced by him. *M'Bain v. Wallace*. 627, 657 note.

See PARTITION, 29.

TITLE, 41, 59 note.

SECURITY.

1. The judgment and execution were ordered to stand as security. *Wallingford v. Mutual Society*. 65

See PRINCIPAL AND SURETY, 317, 236 note.

SENTENCE.

See CRIMINAL LAW, 399, 418 note.

SERVICE.

See JURISDICTION, 495, 522 note.

SLANDER.

See DEFAMATION, 336.

SOVEREIGN.

1. *Held*, in an information of intrusion relating to land in British Honduras, that the defendants having shown sixty years' adverse possession there from before 1817, by themselves and their predecessors in title, without disturbance or effectual claim by the Crown, such information must be dismissed.
2. Although British Honduras was formally declared to be a British colony, and formally annexed to British dominions by a proclamation of Her Majesty, dated the 12th of May, 1862, yet grants of land having been made therein by the Crown as early as 1817; *held*, overruling the opinion of the Supreme Court, that the territorial sovereignty of the Crown must be deemed to have been acquired in or before that year. *Attorney-General v. Bristowe.* 335
3. Lands taken under a conditional sale and afterwards forfeited to the Crown are not open to a conditional purchase under sect. 18 of the Crown Lands Alienation Act, 1861. The Crown has, under the 18th section, the option either to sell them by public auction or to retain them in its own hands. *Blackburn v. Flavelle.* 677

See PRINCIPAL AND AGENT, 666, 674 note.

STATUTES.

1. Whether the word "person" in a statute can be treated as including a corporation must depend on a consideration of the object of the statute, and of the enactments passed with a view to carry that object into effect.
2. The 31 & 32 Vict. c. 121, was passed to protect the public against the sale by incompetent persons of poisonous drugs, and in the 1st section enacts that "it shall be unlawful for any person to sell, or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of chemist and druggist, &c., or pharmacist, &c., unless such person shall be a pharmaceutical chemist, &c., within the meaning of this act, and be registered under this act." By sect. 15, any person who

shall offend in this respect (the words of sect. 1 being almost repeated) shall be liable to pay a penalty of £5, to be sued for as therein directed.

3. A small body of persons had obtained a registration under the Companies Acts, 1862-1867. One only of these persons was a qualified, certified, and registered chemist. His share in the company was very small: he was the person who appeared in the shop and conducted the sales, and he received a salary for his labor in dispensing the drugs, which were sold for the profit of the company:

Held, that, under these circumstances, the word "person" in the 1st and 18th sections of the statute did not apply so as to make this incorporated company liable to the penalty. But the actual seller must be a qualified person. *Pharmaceutical, etc., v. London, etc.* 153, 169 note.

4. The Caledonian Railway Company for thirteen years up to July, 1879, had been proprietors of the D. and A. Railway, and had incurred certain liabilities in respect to payment of dividends to preference and ordinary shareholders of the D. and A. line. The preamble of the North British Railway (D. and A. Joint Line) passed July, 1879 (42 & 43 Vict. c. clv), set forth that it was expedient that the Caledonian and North British Companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the D. and A. line. Sect. 3 provided that on and after the 1st of February, 1880, called the "vesting period," all interest which the Caledonian possessed should be transferred to the Caledonian and North British jointly and in equal proportions in manner hereinafter provided by the act. Section 6 provided that the consideration for the transfer of the joint line shall be as follows: "(1.) From and after the vesting period the company (the North British) shall pay to the Caledonian Railway Company half-yearly on the 1st of March and 1st of September in each year a sum equal to one-half of the aggregate of the following half-yearly payments, for which the Caledonian Railway Company are now liable in respect of their acquisition of the D. and A. Railway."

The Caledonian Railway Company

claimed that under this section there was a half-yearly payment amounting to £5,903 15s. due on the 1st of March, 1880:

Held, affirming the decision of the court below, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the first of February, 1880.

5. *Per* LORD SELBORNE, L.C.: The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway v. North British Railway.* 383 *note*.

See EMINENT DOMAIN, 356, 378 *note*.
REVENUE, 418.
TAXES, 162.

STOCKHOLDERS.

See CORPORATIONS, 489.

SUBROGATION.

See PRINCIPAL AND SURETY, 217, 236 *note*.

SUPPORT.

1. A clause in a mining lease that the lessee may work the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground works for mining purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people.
2. Nor did the words that the mining lessee should have liberty to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works, and things upon, in, or under, or above,

the said premises, as shall be necessary or convenient for working and carrying away the same," making compensation, &c., enlarge the power so to deal with the mines as to let down the surface.

3. *Per* LORD BLACKBURN: In common right the person who owns the surface has a right to have it properly supported below by minerals. A court of law has to look at the documents to see whether the parties have agreed upon something different from the common right. *Davis v. Tretharne.* 528, 538 *note*.

4. A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.

5. *Semble*, *per* LORD SELBORNE, L.C.: Such a right of support is an easement within the meaning of the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

6. Two dwelling houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiffs) was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment.

More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support

of the adjacent soil sank and fell, bringing down with it most of the factory:

Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury.
Dallon v. Angus. 742, 835 note.

SURETY.

See PRINCIPAL AND SURETY.

T.

TAXES.

1. The intention to impose a charge upon the subject must be shown by clear and unambiguous language.

Where by an act of the Cape Colony (No. 6, 1864), "for imposing a duty upon bank notes," which act was assumed to have been validly extended to the province of Griqualand West, it was provided that banks issuing within the colony notes of their own, purporting to be issued within the colony, and so (unless expressed to be payable elsewhere) to be payable by them within the colony, should make a return thereof with a view to the imposition of the duty chargeable by that act; it was

Held, that the appellant bank, which had a branch within the province, and there put in circulation notes issued by the bank in the colony payable in the colony, but did not issue any notes payable in the province, was not liable, according to the true construction of the act, to make any return to the respondent, the treasurer of the province, or to pay duty on the notes put into circulation by its branch.

Although by sect. 10 of the act banks of issue liable to make the return prescribed by the act, must include within such return such notes also as they have put into circulation, yet banks which, not issuing any notes purporting to be locally issued, and therefore not liable to make a return, put into circulation within the province their own notes, issued elsewhere, are not

in respect thereof liable to the duty imposed by the act. *Oriental Bank v. Wright.* 152

2. A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working.
3. *See* Lord Penzance's opinion as to the method of taxation intended by the Legislature to be applicable to mines. *Coltress v. Black.* 458

TENDER.

See PERFORMANCE, 201, 218 note; 419, 439 note.

THÉÂTRE.

See COVENANTS, 440.

TITLE.

1. Where there is a power, by law, to sell, a purchaser may obtain, from the vendor, even as against the true owner, a good title, but that cannot extend, by implication, to a pledge.

Barrow was a leather merchant in London. Bonnell was a tanner in Canada. Barrow agreed to pay Bonnell 1*ld.* per pound for every hide tanned by Bonnell in the mode of the country, and Bonnell was to procure freight, and send back the hides. Barrow sent out a large number of the hides; they were tanned, and freight was procured for them, but in the meantime Bonnell had obtained from the Toronto Bank bank advances, on his own account, on bills, and hypothecated the hides to the bankers, as security for such advances, engaging to hand over to them the bills of

lading if his bills of exchange were not duly honored. They were not duly honored, and the bankers (who had acted in entire ignorance of the transactions between Barrow and Bonnell) claimed to retain the bills of lading and the hides until their demands were satisfied:

Held, that, under the circumstances of the case, Bonnell could not, under any law, English or Canadian, claim to be a factor or agent of Barrow entitled to pledge Barrow's goods, and that consequently, the bankers could not set up any title to the goods, as derived from him, against the real owners. *City Bank v. Barrow*. 41,

59 note.

See *SALE*, 627, 657 note.

TRUSTS AND TRUSTEES.

1. A testatrix directed her trustees to pay the interest or annual rent of £2,000 to Mrs. A. during her life and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. B. in life-rent, with the fee to her children.

The trustees were empowered by the deed to realize, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained;" with power also "to lend or place out on such securities, heritable or movable, as they shall consider advantageous, the foresaid legacies of £2,000 and £2,000 respectively, the securities to be conceived in favor of my trustees, and that for the purposes of this trust and no otherwise."

The testatrix at her death held £850 stock of an unlimited bank. The trustees, at the desire of Mrs. A. and without consulting Mrs. B., set £200 of this stock aside as part of the fund appropriated to Mrs. A., and realized the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of £2,000, and that they had paid the residue, received their discharge from Mrs. A. and Mrs.

B. Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. A. and Mrs. B. All the investments stood in the names of the testatrix's trustees.

The bank became insolvent, and calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. B. objected to any portion of her legacy being taken:

Held, reversing the decision of the court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. B. and her family for liabilities incurred on those allotted to Mrs. A. and her family. *Fraser v. Murdoch*. 837

See *COSTS*, 550.

PARTNERSHIP, 282, 299 note.

V.

VENDOR AND VENDER.

See *SALE*, 627, 657 note.

VERDICT.

See *PRACTICE*, 688

W.

WARRANTY.

See *COVENANTS*, 216.

WILLS.

1. In ascertaining whether a bequest falls within the rule against remote-

ness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule.

2. The vice of remoteness affects a class as a whole, if it may affect an unascertained number of its members.

Per THE LORD CHANCELLOR (Lord Selborne): In a devise to a class, if all the shares would necessarily be ascertained within due limits of time, it would be immaterial that in a later part of the will there were found, as to some particular shares, superadded conditions which might or might not be void by reason of remoteness.

3. A will contained a bequest of a particular sum of £3,000 to the testator's daughter and her husband for life, and after their deaths "my will is that the sum of £3,000, the securities for the same and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." A life interest in another sum of £3,000 was given to the son with exactly the same trusts for his issue; in default, over.

Held, that the bequest was void for remoteness.

4. *Held*, also, that the bequest being to a class, the parts of it could not be severed, so as to treat one portion as good, though the other was void. *Pearks v. Moseley*. 80

5. The testator devised an estate to his six grandsons (of whom the appellant was one) "during their respective lives, in equal shares as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first

and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their seniorities in tail male."

By a proviso at the end of the will the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male."

Two out of the six grandsons died without issue. The eldest son of the appellant was born before the date of the will, and by a disentailing deed executed after the testator's death conveyed to the appellant his share and interest in the said estate in fee.

In a suit for declaration of title and consequent relief:

Held, that the appellant was entitled to an estate in fee simple in one-fourth part of the hereditaments and premises, the subject of the suit.

The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity.

6. Consequently the gift of an estate tail

to the appellant's eldest son, who was born before the date of the will, was not revoked. *Gibbons v. Gibbons*. 540

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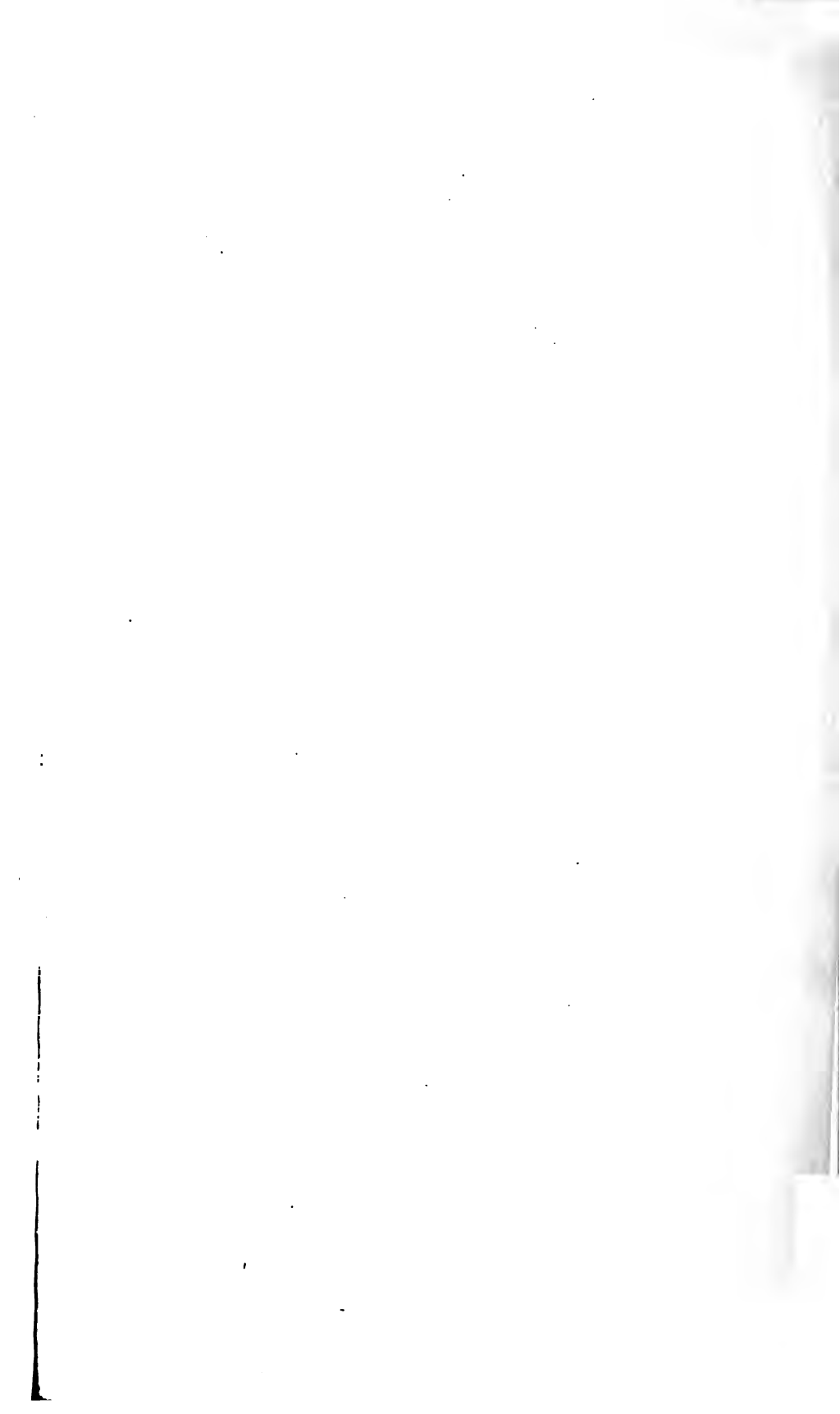
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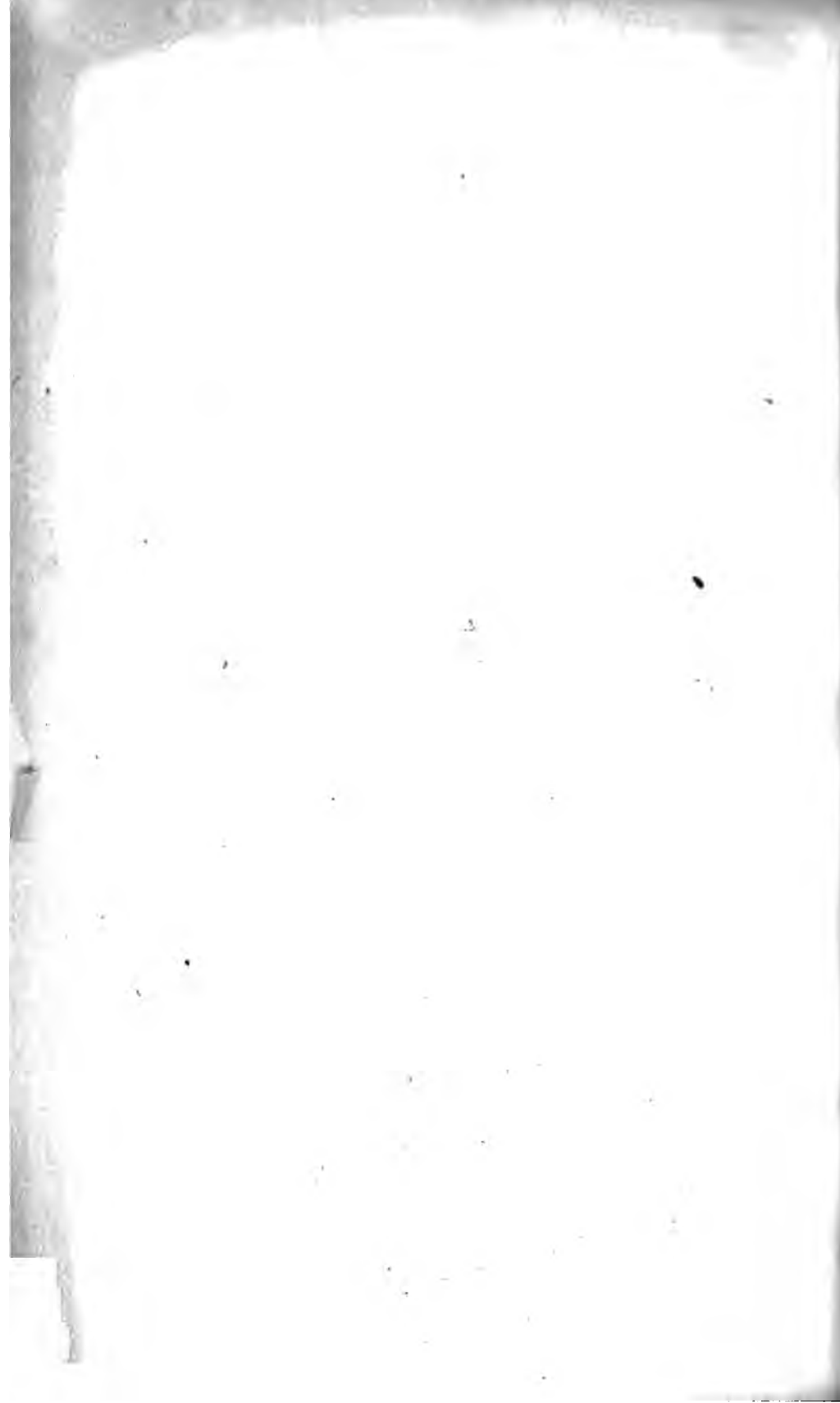
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